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IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEAN COLLINS, an indivicual and TERRY COLLINS, her husband

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ABUNAVA DAS, M.D.

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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58 pp

QUESTIONS PRESENTED FOR REVIEW

1. May the Courts of Pennsylvania disregard and ignore a statute (42 Pa.C.S.A. §5535) promulgated and enacted by the Legislature of the Commonwealth of Pennsylvania, which statute gives litigants one year to transfer a cause of action to state court which has been dismissed from federal court for lack of jurisdiction?

2. Was due process violated when the Courts of Pennsylvania judicially amended the Pennsylvania Transfer Statute (42 Pa.C.S.A. §5103) by adding the word "prompt" or "promptly," which word does not exist in the statute and which was not defined in any way by any Pennsylvania court, thus denying the Petitioners the right to transfer their claim from federal to state court six and one half months after their claim was dismissed from federal court?

3. Does the Superior Court of Pennsylvania's requirement of "promptness", affirmed by the Supreme Court of Pennsylvania, Per Curiam, render the Pennsylvania transfer statute unconstitutionally vague, since, (1) the court disregarded the fact that the word "prompt" or "promptly" does not exist in the statute, (2) the court provided no definition of the word "prompt" or "promptly," (3) the court provided no time period within which to effect a transfer and, (4) the court ignored Pennsylvania's Savings Statute (42 Pa.C.S.A. §5535) which provides a litigant one year to effect a transfer?

4. Is it a denial of due process for the Courts of Pennsylvania to retroactively rule that the transfer of a case from federal to state court for lack of federal jurisdiction is not "prompt" when, (1) the word "prompt" or "promptly" does not exist in the statute, (2) a "promptness" requirement amounts to a judicial amendment of the statute, (3) the Petitioners case was transferred from federal to state court in less than seven months after being dismissed from federal court, (4) the court provided no guidance for Petitioners or future litigants as to what it meant by the word "prompt" or "promptly" since it failed to provide a definition of the term "prompt" or "promptly", and (5) the Pennsylvania Legislature

through its Savings Statute grants a litigant one year to effect a transfer?

5. Is due process violated when a lower state appellate Court acts outside its jurisdiction or authority by adding to the Pennsylvania Transfer Statute the procedural amendment of "promptness," when the Pennsylvania Constitution places procedural rule making power exclusively within the jurisdiction of the Pennsylvania Supreme Court, and, thereafter, the Pennsylvania Supreme Court affirms, Per Curiam, the lower appellate courts ruling?

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Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT PENNSYLVANIA

OPINIONS BELOW

The Supreme Court of Pennsylvania affirmed an Order of the Superior Court of Pennsylvania, Per Curiam, without opinion, after granting Petitioners' Petition for Allowance of Appeal and oral argument, No. 45 Western District Appeal Docket 1993, (Appendix "A-2"). Pennsylvania Supreme Court Justice Nicholas Papadakos filed a dissenting opinion, (Appendix "A-3, 4"), which is reported at 640 A.2d 379, ___ Pa. ___ (1994). The opinion of the Superior Court of Pennsylvania is reported at 419 Pa. Super. 519, 615 A.2d 760 (1992). The written opinion and order of the Court of Common Pleas of Greene County, Pennsylvania is unreported, (Appendix "A- 24-27").

STATEMENT OF JURISDICTION

The Order of the Supreme Court of Pennsylvania was entered on April 13, 1994, ("A-2"), affirming the Order of the Superior Court of Pennsylvania, Per Curiam. An Application for Rehearing was timely filed and was denied on May 11, 1993, ("A-1"). This petition for a Writ of Certiorari was filed within 90 days of that date pursuant to Supreme Court Rule 13.4. This Court has jurisdiction to review the Supreme Court of Pennsylvania decision by Writ of Certiorari pursuant to 28 U.S.C. § 1257. The enforcement of the Pennsylvania Supreme Court judgment will deprive the Petitioners of their federal and state rights of due process and trial by jury. The Petitioners have a right to Supreme Court review because the Petitioners have presented their due process claims and right to trial by jury claims in the State courts below. The Courts of Pennsylvania have denied the Petitioners' due process rights and right to trial by jury in the following ways:

1) By dismissing Petitioners claim, the Courts of Pennsylvania have disregarded and ignored Pennsylvania statute 42 Pa.C.S.A. § 5535 which in conjunction with 42 Pa.C.S.A. § 5103(b) gives a litigant one year to transfer a case from federal court to state court which has been dismissed from federal court for lack of federal court jurisdiction. Petitioner timely transferred her action in less than seven months;

2) The Supreme Court of Pennsylvania's Per Curiam affirmance of a Superior Court Order that transfer be made "promptly" when a case is dismissed from federal court for lack of jurisdiction is a violation of federal due process because (1) the undefined term "prompt" or "promptly" is unconstitutionally vague, (2) the term "prompt" or "promptly" does not exist in the statute, (3) the Superior Court did not have authority to create a "promptness" requirement and, (4) the Pennsylvania courts ignored the Pennsylvania Savings Statute which provides a litigant one year to effect a transfer;

3) The Courts of Pennsylvania retroactive ruling that a case transferred from federalcourt to state court for lack of federal jurisdiction within seven months is not "prompt" violates due process because, (1) the word "prompt" or "promptly" does not exist in the statute, (2) the "promptness" requirement amounts to a judicial procedural amendment of the stat (3) the Superior Court had no authority whatsoever to procedurally amend the statute, (4) since the court failed to define the word "prompt" or "promptly" Petitioners had no notice of what their obligations were under the amended statute.

The Petitioners throughout this litigation have argued that the statute created by the Courts of Pennsylvania, and not the Pennsylvania Legislature, is vague, unfair and violates the Petitioners Constitutional rights to due process.

U.S. CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

A. Due Process Rights

The Fifth Amendment to the Constitution of the United States of America states:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in the time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

The Fourteenth Amendment to the Constitution of the United States of America states:

> All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State Shall make or enforce any law which shall abridge the privileges or immunities of the citizens of the United States; nor shall any state deprive a person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

B. Right to trial by jury and to have the factual issues examined by a jury.

The Seventh Amendment to the Constitution of the United States of America states:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

STATEMENT OF THE CASE

The Petitioners, Jean Collins and Terry Collins have filed this Writ of Certiorari because the rulings of the Courts of the Commonwealth of Pennsylvania have denied the Petitioners' Fifth and Fourteenth Amendment due process rights and their Seventh Amendment right to trial by jury. The Courts of Pennsylvania have without authority disregarded and ignored a statute promulgated and enacted by the Legislature of Pennsylvania which allows a litigant one year to transfer an action which has been dismissed form federal court for lack of jurisdiction to state court. Also, the Courts of Pennsylvania have created a new statute and have applied that new statute retroactively to the Petitioners thus depriving the Petitioner of due process, equal protection of the laws and their right to trial by jury. Moreover, the Courts of Pennsylvania have created a vague statute by requiring "prompt" transfer without setting a specific time limit, thus giving litigants no direction as to when a transfer is timely. Furthermore, the "prompt" transfer

requirement was created by the Superior Court of Pennsylvania which has no authority to create such a requirement. "Prompt" or "promptly" does not exist in the Transfer Statute. Therefore, the Superior Court of Pennsylvania's Order denying the Petitioners' transfer to State Court is a nullity and the Affirmance, Per Curiam, by the Supreme Court of Pennsylvania of the decision is a nullity and a violation of the Petitioners due process rights and their right to trial by a jury.

A. Factual Statement

On or about October 8, 1986, the Respondent Arunava Das, M.D., sexually molested and forced oral copulation upon the Petitioner, Jean Collins. These acts took place at Greene County Memorial Hospital, the other Respondent to this Writ of Certiorari. Both Arunava Das, M.D., and Jean Collins were employees of Greene County Memorial Hospital at the time. These appalling and outrageous acts by Respondent, Arunava Das, M.D., have caused Mrs. Collins great pain and suffering.

B. Procedural Statement

On April 29, 1988, the Petitioners Jean and Terry Collins timely filed a Complaint in the United States District Court for the Western District of Pennsylvania for the damages inflicted upon them as a result of the October 8, 1986 incident. The Federal District Court exercised jurisdiction over this action even though all parties were Pennsylvania residents because the Complaint included a claim under Title VII of the Civil Rights Act of 1964, 421 U.S.C., §2000(e), (hereinafter "Title VII"), against the Respondent, Greene County Memorial Hospital. The court also exercised pendant jurisdiction over common law claims alleging negligence and intentional infliction of emotional distress.

On August 8, 1990, the Petitioners Jean and Terry Collins accepted the Respondent, Greene County Memorial Hospital's offer of Judgment pursuant to F.R.C.P. 68 in regard to the Title VII claim against the Respondent Hospital. Since the parties settled the federal claim, the district court judge dismissed the action because the case no longer involved a federal question and because the Pennsylvania State Transfer Statute 42 Pa.C.S.A. § 5103(b), would

allow the Petitioners to pursue there common law claims in State court without the threat of a statute of limitations problem, (see order ("A-28, 29"). The pertinent statutes are quoted at length on pages 6,7,8 and 9 below.

On March 19, 1991, less then seven months after dismissal from federal court, the Petitioners filed all necessary papers in the Court of Common Pleas of Greene County, Pennsylvania, pursuant to Pennsylvania's 42 Pa.C.S.A. § 5103(b), to have the case transferred. After the case was transferred the Respondents filed preliminary objections claiming that the transfer was untimely. On June 7, 1991, Judge Grimes of the Court of Common Pleas of Greene County, Pennsylvania sustained the preliminary objections on the grounds that the Petitioners' transfer was not "prompt" as required by the "express" language of the Transfer Statute, ("A- 24-26"). However, the word "prompt" or "promptly" does not appear in the Transfer Statute and the Transfer Statute specifically gives a litigant one year to transfer his/her cause of action from federal to state court.

The Petitioners timely filed a Notice of Appeal of Judge Grimes decision to the Superior Court of Pennsylvania. The Superior Court affirmed Judge Grimes decision even though the Transfer Statute specifically gives a litigant one year to transfer a cause of action from federal court to state court. The Superior Court of Pennsylvania ruled that a transfer must be made "promptly" without giving a specific time limitation, and that six and one half months was not "prompt", ("A-5"), thereby discarding the reference in the Transfer Statute, 42 Pa.C.S.A. §5103(b), to the Pennsylvania Savings Statute, 42 Pa.C.S.A. § 5535, which expressly provides litigants one year to transfer the action.

The Petitioners timely filed a Petition for Allowance of Appeal to the Supreme Court of Pennsylvania which was granted. After oral argument the Supreme Court of Pennsylvania affirmed the Order of the Superior Court of Pennsylvania, Per Curiam, without opinion, ("A-2"), thus creating a new statute in Pennsylvania without due process, notice or fairness. The Petitioners requested a rehearing which was denied by the Supreme Court of Pennsylvania on May 11, 1994. ("A-1").

REASONS FOR GRANTING A WRIT OF CERTIORARI

I

THE COURTS OF PENNSYLVANIA VIOLATED THE PETITIONERS DUE PROCESS RIGHTS AND RIGHT TO TRIAL BY JURY BY DISREGARDING A STATUTE PROMULGATED AND ENACTED BY THE LEGISLATURE OF THE COMMONWEALTH OF PENNSYLVANIA.

The Courts of Pennsylvania have disregarded and ignored a statute promulgated and enacted by the Legislature of Pennsylvania and have created a new and vague time limitation to transfer a cause of action from federal court to state court without adequate notice and have deprived the Petitioners of their constitutional rights of due process and trial by jury. On August 23, 1990, the United States District Court for the Western District of Pennsylvania, dismissed the Petitioners claim for lack of jurisdiction. On March 19, 1991, less than seven months after the dismissal from federal court the Petitioners transferred their case from United States District Court for the Western District of Pennsylvania to the Court of Common Pleas of Greene County, Pennsylvania, well within the one year time limitation required by the Legislature of the Commonwealth Pennsylvania in 42 Pa.C.S.A. § 5103 and 42 Pa.C.S.A. § 5535, which in pertinent part provide:

42 Pa. C.S.A. § 5103 provides.

> **(a) General rule.** —If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this commonwealth, where the appeal or the other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was

first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of the Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

(b) Federal cases.

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court of before a district justice of this Commonwealth. Where a mater is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States Court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. Section 5535(a)(2)(i) (relating to ter-

mination of the prior matter) shall not be applicable to a matter transferred under this subsection. (Emphasis added).

42 Pa. C.S.A. § 5535 (a) provides:

(1) **If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination** and any other party may impose any defense or claim which might have ben interposed in the original action or proceeding.

(2) Paragraph (1) does not apply to:
(i) An action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.

(ii) An action or proceeding terminated by voluntary non-suit, neglect to prosecute the action or proceeding, or final judgment upon the merits.

(emphasis added.)

Clearly any reading of 42 Pa.C.S.A. § 5103 and 42 Pa.C.S.A. § 5535, unequivocally dictates that the Legislature of Pennsylvania intended to provide a litigant one year to transfer a wrongful death or personal injury claim dismissed from a United States court for lack of jurisdiction to a Pennsylvania state court. Why else would 42 Pa.C.S.A. § 5103(b)(2), expressly state "Section 5535(a)(2)(i) (relating to termination of the prior matter) shall not be applicable to a matter transferred under this subsection," the federal transfer section. Certainly the Legislature specifically intended that all litigants, including those with personal injury or wrongful death claims, are to have one year to transfer a cause of action from federal to state court when the action is terminated in federal court due to lack of subject matter jurisdiction.

42 Pa.C.S.A. § 5535 (a) (1) states; "If a civil action or proceeding is timely commenced and is terminated, a party, or his successor in interest, may, notwithstanding any other provision of this subchapter, commence a new action or proceeding upon the same cause of action within one year after the termination . . ." The Petitioners action in federal court was dismissed, i.e. it was terminated. 42 Pa.C.S.A. § 5103(b), gives a litigant the right to transfer a cause of action terminated in federal court for lack of jurisdiction to State Court. 42 Pa.C.S.A. §5103(b)(2) specifically states "Section 5535(a)(2)(i) (relating to termination of the prior matter) shall not be applicable to a matter transferred under this subsection." 42 Pa.C.S.A. Section 5535(a)(2)(i), does not allow a litigant to "save" or recommence "any action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence of another", once it has been terminated. Since Section 42 Pa.C.S.A. Section 5535(a)(2)(i), does not apply to cases transferred from federal court to state court for lack of jurisdiction, (see, 42 Pa. C.S.A. § 5103(b)(2)), Section 5103(b) and Section 5535, specifically provide a litigant with one year to transfer a personal injury or wrongful death claim from federal court to state court when the action has been dismissed for lack of jurisdiction. The Courts of Pennsylvania have decided to disregard and ignore 42 Pa.C.S.A. §5535 and make their own requirement that the transfer be made "promptly" without defining the meaning of the word "prompt" or "promptly", in the context of a transfer. The Courts of Pennsylvania have violated the due process rights of the Petitioners by disregarding and ignoring the statutes enacted by the Commonwealth of Pennsylvania, and amending the Transfer Statute by unlawfully adding the undefined word "prompt" or "promptly".

Statues once enacted must be followed and courts cannot deviate from the clear meaning of the statute. In Service v. Dulles, 354 U.S. 363, 77 Sct. 1152, 1 L.Ed.2d 1403 (1957), the Court ruled that rules once promulgated can not be ignored unless and until they are effectively repealed. See also, Accardi v. Shaughnessy, 347 U.S. 260, 74 Sct. 499, 98 L.Ed. 681 (1959), this case held that a failure to follow promulgated rules is a violation of due process.

The Petitioners brought to the Supreme Court of Pennsylvania's attention that 42 Pa.C.S.A. § 5535, read in conjunction with 42 Pa.C.S.A. § 5103, clearly gives a litigant one year to transfer an action for personal injury or death to state court if the case was dismissed from federal court for lack court jurisdiction. The Supreme Court of Pennsylvania decided to ignore and disregard the clear meaning of the statute and affirm the Superior Court of Pennsylvania, Per Curiam, without opinion. Clearly when a Court disregards and ignores the plain meaning of a statute and creates a new statute by inserting the word "prompt" or "promptly" into the statute a litigant's due process rights have been violated. Service, Supra.

II

THE SUPERIOR COURT OF PENNSYLVANIA VIOLATED THE PETITIONERS' DUE PROCESS RIGHTS BY ENFORCING A PROCEDURAL ORDER ILLEGALLY CREATED BY THE SUPERIOR COURT THAT REQUIRES CASES DISMISSED FROM FEDERAL COURT FOR LACK OF JURISDICTION BE TRANSFERRED TO STATE COURT "PROMPTLY". FURTHERMORE THE WORD "PROMPTLY" IS NOT DEFINED IN THE ORDER AND THEREFORE IS VAGUE ON IT'S FACE AND VIOLATES THE PETITIONERS' DUE PROCESS RIGHTS.

In this case below the Superior Court of Pennsylvania Ordered that a litigant must "promptly" transfer an action which has been dismissed from federal court for lack of jurisdiction to state court and that the Petitioners did not "promptly" transfer their action, ("A-11"). This Order was affirmed, Per Curiam, by the Supreme Court of Pennsylvania without opinion; however, Supreme Court Justice Papadakos dissented raising the very issues created by this case. The Superior Court Order that an action must be transferred "promptly" is vague on its face and violates the Petitioners' due process rights guaranteed by the United States Constitution.

The Petitioners transferred their case to a Pennsylvania state court within seven months of being dismissed from federal court. The Superior Court of Pennsylvania, without notice decided that seven months was not "prompt" enough and found for the Respondents in this action. The Superior Court of Pennsylvania made this decision based on dicta contained in a previous Superior Court of Pennsylvania ruling[1] which stated;

". . . we now emphasize that in order to protect the timeliness of an action under 42 Pa. C.S.A. § 5103, a litigant, upon having his cases dismissed in federal court for lack of jurisdiction, must "promptly" file a certified transcript of the final judgment of the federal court and, at the same time, a certified transcript of the pleadings from the federal action. The litigant shall not file new pleadings in state court." Williams v. F.L. Smithe Machine Co., Inc., 395 Pa.Super. 511, 577 A.2d 907 (July 1990).

First, the Superior Court of Pennsylvania had no authority to create a new procedural rule. Article V § 10(c) of the Pennsylvania Constitution, specifically provides the Supreme Court of Pennsylvania with the exclusive power to make procedural rules in the state of Pennsylvania. Since the Superior Court of Pennsylvania did not have authority to "enact" a "promptness" requirement, its Order dismissing Petitioners claim is a nullity, see, Commonwealth v. Boerner, 281 Pa.Super. 505, 422 A.2d 583, 587, (1980)(when a court takes action beyond the power conferred on it by law . . . its action is a nullity . . .). Because the "prompt" transfer requirement by the Superior Court of Pennsylvania is a nullity the Petitioners were not on notice of any requirement that the transfer must be "prompt". The dismissal of Petitioner's case by the Superior Court of Pennsylvania and the affirmance of this dismissal by the Supreme Court of Pennsylvania, Per Curiam, without opinion, with only a dissent raising the present issues, is a violation of the Petitioners' due process rights. Insofar as the Superior Courts "promptness" requirement was a nullity from the beginning there was nothing for the Supreme Court of Pennsylvania to affirm. See Boerner, Supra.

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1 Ironically, the Plaintiff in this prior case attempted to transfer her claim from federal to state court seven months after being dismissed from federal court for lack of subject matter jurisdiction. The court found that transfer to be timely.

Second, the Superior Court of Pennsylvania's attempt to create a procedural statute was a complete failure. The use of the word "prompt" or "promptly" with no definition violates every rule of statutory construction and due process. A statue is unconstitutionally vague when it "either forbids or requires the doing of an act in terms so vague that men of ordinary intelligence must necessarily differ as to its application" Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L. Ed. 322 (1926). Men of ordinary intelligence differ as to the definition of "prompt" or "promptly". In fact Black's Law Dictionary, Sixth Edition, states "[T]he meaning of the word [promptly] depends largely on the facts in each case, for what is "prompt" in one situation may not be considered such under other circumstances of conditions." The Superior Court of Pennsylvania in its decision never provided a definition for the words "prompt" or "promptly" in the context of a transfer. The only thing known at this point is that the Superior Court of Pennsylvania does not consider just under seven months "prompt" but this fact was not known at the time the Petitioners were dismissed from federal court. See Williams v. Smithe, Supra., 577 A.2d 907. As Justice Papadakos stated in his dissenting Opinion to the Supreme Court's Per Curiam affirmance:

> "In fact, the Superior Court opinion does not specifically adopt a thirty day rule but only concludes that policy reasons justify that a party act "promptly" in transferring his action which has been dismissed for lack of jurisdiction by the federal courts. I would have preferred that we take the opportunity and set a rule for such situations and consider whether there are equitable circumstances which can excuse a delayed filing as well as consider whether the party seeking to dismiss a transfer request based on lateness must also demonstrate that the plaintiff's tardiness has caused him prejudice. Because all of these questions remain unanswered, I believe the per curiam disposition of this appeal does a disservice to the bar and these litigants. ("A - 4").

This Honorable Court should rule that the use of the word "prompt" or "promptly" in regards to a filing requirement, when substantive rights are at issue is vague and violates the due process

clause of the United States Constitution. Furthermore, insofar as the Superior Court did not have the authority to mandate a "promptness" requirement, since only the Supreme Court of Pennsylvania could make such a mandate, see, Article V § 10(c) of the Pennsylvania Constitution, this Honorable Court should rule that the Petitioners did not have notice of any "promptness" requirement for transferring their claim as is required by the due process clause of the United States Constitution.

III

THE RETROACTIVE RULING THAT AN ACTION MUST BE TRANSFERRED "PROMPTLY" FROM FEDERAL COURT TO STATE COURT WHEN THE ACTION L A C K S FEDERAL JURISDICTION AND THAT "PROMPTLY" IS LESS THAN JUST UNDER SEVEN MONTHS VIOLATES THE PETITIONERS' DUE PROCESS RIGHTS

For the first time the Courts of Pennsylvania have dismissed a claim that was first instituted in federal court and later dismissed for lack of jurisdiction and then transferred to state court because it was not "promptly" transferred. This retroactive application of a "promptness" requirement violates the due process right that a substantive right will not be retroactively taken away. see, Chevron Oil Company v. Huson, 404 U.S. 97, 92 S.Ct. 349, 355 (1971). This unconstitutional result is even more glaring since it is clear the controlling statutes do not contain the undefined word "prompt" or "promptly" and a plain reading of the statutes allows a litigant one year to effect a transfer.

The Superior Court in Williams v. F.L. Smithe Machine Co., Inc., 395 Pa.Super. 511, 577 A.2d 907 (July 1990), stated; "a litigant, upon having his cases dismissed in federal court for lack of jurisdiction, must promptly file a certified transcript of the final judgment of the federal court . . .". The definition of the word "prompt" or "promptly" as it pertains to transfer of a case from state to federal court has never been defined. The Courts of Pennsylvania have retroactively decided that just under seven

months is not "prompt". No further definition was given. It is a due process violation to retroactively define "promptly" as being less then just under seven months. See, Chevron, Supra.

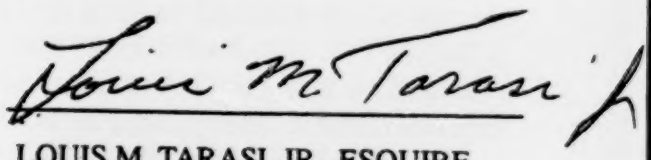
Also, such a ruling is arbitrary and capricious in that it provides no guidance for future litigants. The Superior Court of Pennsylvania had no authority to mandate a new procedural rule, see, Article V § 10(c) of the Pennsylvania Constitution, which gives the Supreme Court of Pennsylvania the exclusive right to make procedural rules that do not abridge, enlarge, nor modify the substantive rights of any litigant. Since the Superior Court did not have authority to mandate that transfers be "prompt," the mandate is a nullity, see, Commonwealth v. Boerner, 281 Pa.Super. 505, 422 A.2d 583, 587, (1980)(when a court takes action beyond the power conferred on it by law . . . its action is a nullity . . .). Since the Superior Court of Pennsylvania decision was a nullity the issue was a case of first impression for the Supreme Court of Pennsylvania. The Supreme Court of Pennsylvania affirmed the decision of the Superior Court, Per Curiam, without decision. The ruling by the Supreme Court of Pennsylvania took away the Petitioners substantive right to their day in court by retroactively ruling that a transfer must be made "promptly" without the issue ever be raised before on whether "promptness" is required. This Honorable Court should rule that the Supreme Court of Pennsylvania can not take away a substantive right by ruling that a case must be transferred "promptly" without ever making such a determination before, and after creating an unconstitutionally vague statute by judicially adding the undefined word "prompt" or "promptly" which does not exist in the statute. This is a clear violation of the Petitioners due process rights. Chevron, Supra.

CONCLUSION

This case cries out for justice. The Petitioners, Jean and Terry Collins, satisfied Pennsylvania Statutes, 42 Pa. C.S.A. § 5103 and 42 Pa. C.S.A. § 5535, by timely filing for transfer to state court within one year as required. The Courts of Pennsylvania have decided to disregard and ignore the one year allowance mandated by 42 Pa. C.S.A. § 5535, and have decided that transfer must be made "promptly", without defining the word "prompt" or "prompt-

ly". The Petitioners transferred their case in less than seven months. The Courts of Pennsylvania with no previous ruling on the issue or definition of the word "prompt" or "promptly" decided that a transfer in just under seven months violated the law even though there was no notice that just under seven months was not "prompt" and dismissed the Petitioners cause of action. This Honorable Court should rule that the actions by the Courts of Pennsylvania have violated the Petitioners due process rights and reinstate the Petitioners' cause of action against the Respondents.

Respectfully submitted,



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APPENDIX

APPENDIX INDEX

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RECEIVED
MAY 13 1994

The Supreme Court of Pennsylvania
Western District

CHARLES W. JOHNS, ESQUIRE
PROTHONOTARY
IRMA T. GARDNER
DEPUTY PROTHONOTARY

801 CITY-COUNTY BUILDING
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May 12, 1994

Louis M. Tarasi, Jr., Esq.
David E. Johnson, Esq.
Brian C. O'Leary, Esquire
TARASI & JOHNSON, P.C.
510 Third Avenue
Pittsburgh, PA 15219

In Re: Jean Collins, an individual; and Terry Collins, her husband v. Greene County Memorial Hospital, a Corporation; and Arunava Das, M.D.
No. 0045 W. D. Appeal Docket 1993

Gentlemen:

The Court has entered the following Order on your Petition for Reargument in the above-captioned matter:

"PER CURIAM
AND NOW, this 11th day of May, 1994, Appellants' Application for Reargument is hereby denied.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993."

Accordingly, the Original Record in the above-captioned matter has been remanded to the Court of Common Pleas of Greene County, Civil Division today May 12, 1994.

Very truly yours,

Irma T. Gardner
DEPUTY PROTHONOTARY

ITG/dal
cc: Thomas J. Madigan, Esq.
Howard K. Hilner, Esq.
Honorable H. Terry Grimes, PJ
Superior Court of Pennsylvania (No. 1251 Pgh. 1991)

[J-63 of 19941
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	No. 45 W.D. Appeal Dkt. 1993
Appellants	)	Appeal from Order of Superior Court entered November 2, 1992, at No. 1251 Pittsburgh 1991, Affirming Order of Court of Common Pleas of Greene County, Civil Division, entered une 7, 1991, J at A.D. No. 186 of 1991
v	)	
GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.	)	419 Pa. Super. 519, 615 A.2d760 (1992)
	)	Argued: March 8, 1994

ORDER

PER CURIAM: Decided: April 13, 1994

Order affirmed.

Mr. Justice Papadakos files a dissenting opinion.

Mr. Justice Montemuro is sitting by designation as Senior Justice pursuant to Judicial Assignment Docket No. 94 R1800, due to the unavailability of Mr. Justice Larsen, see No. 127 Judicial Administration Docket No. 1, filed October 28, 1993.

JUDGMENT ENTERED THIS 13TH DAY OF APRIL, 1994

/s/ Irma T. Gardner
IRMA T. Gardner, Deputy Prothonotary

[J-63 of 1994]
IN THE SUPREME COURT OF PENNSYLVANIA
Western District

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	No. 45 Western District Appeal Docket. 1993
Appellants	)	Appeal from Order of Superior Court entered November 2, 1992, at No. 1251 Pittsburgh 1991, Affirming Order of Court of
v.	)	Common Pleas of Greene County, Civil Division, Entered June 7, 1991, at No. A.D. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,	)	419 Pa. Supererior Ct. 519, 615 A.2d 760 (1992)
Apellee	)	ARGUED: March 8, 1994

DISSENTING OPINION

MR. JUSTICE PAPADAKOS Decided: April 13, 1994

I dissent to the Majority's per curiam affirmance of the order of the Superior Court in this matter because, in my view, this case presents us with the opportunity to settle the question of how quickly a litigant must act when he seeks to transfer his state claims to state court which were previously part of a federal court proceeding, and which have been dismissed for lack of jurisdiction, and where the

litigants wish to transfer their state claims to a state court in order to litigate these claims.

The Superior Court has concluded that Jean Collins and Terry Collins (Appellants) were not "prompt" when they waited seven months to file the certified copy of their complaint, pleadings and final judgment from the district court's dismissal of their action, as well as their Praecipe to Transfer, in the Green County Court of Common Pleas. Consequently, the Superior Court affirmed the trial court's order sustaining the preliminary objections of Green County Memorial Hospital and Arunava Das, M.D. (Appellees) and striking the transfer of the action from the federal district court.

Unfortunately, neither the Superior Court's opinion nor this Court's per curiam order offer any definitive guidance on the question of what constitutes a "prompt" transfer of an action pursuant to 42 Pa.C. S 5103 from a federal forum to a state one other than the Superior Court's analogy to the rules developed regarding a writ of summons or complaint which is not served within thirty days. It is true that our cases hold that where a plaintiff commences an action by writ of summons and then cannot perfect service within thirty days by complying with the local rules concerning delivery of the summons to the sheriff within that time, then the failure to make a good faith effort to notify the defendant acts to nullify both the writ of summons and the tolling of any applicable statute of limitations.

However, I, do not read the Superior Court's opinion to be imposing a presumption that the transferred action is "dead" on the thirty-first day, as we have concluded with unserved writs of summons or complaints. In fact, the Superior Court opinion does not specifically adopt a thirty day rule but only concludes that policy reasons justify that a party act "promptly" in transferring his action which has been dismissed for lack of jurisdiction by the federal courts. I would have preferred that we take the opportunity and set a rule for such situations and consider whether there are equitable circumstances which can excuse a delayed filing as well as consider whether the party seeking to dismiss a transfer request based on lateness must also demonastrate that the plantiff's tardiness has caused him prejudice. Because all of these questions remain unanswered, I believe the per curiam disposition of this appeal does a disservice to the bar and these litigants. Hence, I dissent.

PUBLISHED OPINION

Jean COLLINS, an Individual; and
Terry Collins, Her Husband,
Appellants,

v.

GREENE COUNTY MEMORIAL HOSPITAL,
a Corporation and Arunava Das, M.D

Superior Court of Pennsylvania.

Argued March 4, 1992.

Filed Nov. 2, 1991.

Plaintiffs filed praecipe to transfer state claims from federal district court to court of common pleas following judgment by federal court dismissing federal claim and remaining state claims for lack of jurisdiction. The Court of Common Please, Greene County, Civil Division, No. A.D. 186 of 1991, Grimes, J., granted defendant's preliminary objection and struck transfer of case. Plaintiffs appealed. The Superior Court, No. 1251 Pittsburgh 1991, Del Sole, J., held that filing of praecipe to transfer claims seven months after federal court's order of dismissal was untimely justifying striking of transfer.

Affirmed.

Johnson, J., dissented and filed opinion.

1. Courts 494

Filing of praecipe to transfer case from federal district court to court of common pleas seven months after judgment by federal court on federal claim and dismissal of remaining state claims for lack of jurisdiction was untimely justifying striking of transfer. 42 Pa.C.S.A §§102, 5103, 5103(a, b).

2. Courts 494

Litigants must act promptly in transferring their state court actions which have been dismissed for lack of jurisdiction by federal courts. 42 Pa.C.S.A. §§102, 5103, 5103(a, b).

Joseph J. Hinchliffe, Pittsburgh, for appellants.

Thomas J. Madigan, Pittsburgh, for appellee Greene County Memorial.

Before DEL SOLE, JOHNSON and FORD ELLIOTT, JJ.

DEL SOLE, JUDGE.

We are asked to consider the right of a litigant, under 42 Pa.C.S. § 5103, to transfer state claims from a federal district court to a court of common pleas following a judgment by the federal court on a federal claim and dismissal of the remaining state claims for lack of jurisdiction. The trial court determined that, because of a seven month delay between the federal court's dismissal of the state claims and the litigant's praecipe to transfer the case, the praecipe was untimely filed. The trial court issued an order which struck the praecipe. We affirm.

Jean and Terry Collins, husband and wife, (the Collinses) brought an action against Greene County Memorial Hospital and Dr. Arunava Das (hereinafter collectively referred to as "Hospital") in the United States District Court for the Western District of Pennsylvania. This suit was comprised of a federal claim based upon the Civil Rights Act of 1964 and several state claims which were before the court on the basis of pendent jurisdiction. On August 17, 1990, following a settlement between the parties on the federal civil rights claim, the district court entered a judgment and final decree on that claim. Six days later, the court dismissed the remaining state claims for lack of jurisdiction.

Nearly seven months later, on March 19, 1991, the Collinses filed a certified copy of the complaint, pleadings, and final judgment from the district court, as well as a Praecipe to Transfer, with-

the Greene County Court of Common Pleas in order to litigate their state claims.

The Hospital filed preliminary objections to the transfer, contending that the documents were not promptly filed. The trial court agreed, noting that "[t]he effort and time needed to file in state court pursuant to the statute is less than would be expected in filing an amended pleading or filing a responsive pleading after disposition of preliminary objections", Opinion of June 7, 1991, at 3, and that, in either of those cases, the Pennsylvania Rules of Civil Procedure allot twenty days. The trial court concluded that this case could not be deemed to have been promptly transferred where the Collinses had taken more than two hundred days to act. Said the court, "as a matter of statutory construction, the filing was not `prompt', as mandated by the transfer statute, the sole vehicle for the plaintiffs to transfer their case from federal court to this court." Opinion at 44.

In Pennsylvania, 42 Pa.C.S. § 5103 governs the transfer of cases from federal court to state court. That statute states, in pertinent part:

§ 5103. Transfer of erroneously filed matters

(a) General rule.-If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally field in the transferee tribunal on the date when the appeal other matter was first filed in a court or magisterial district of the Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if orininally filed in the tranferee court or magestrial district of this Commonweath on the date when first filed in the other tribunal.

(b) Federal cases.-

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a district justice of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. The pleadings shall have the same effect as under the practice in the United States court, but the transferee court or district justice may require that they be amended to conform to the practice in this Commonwealth. Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa.C.S. § 5013(a) and (b).

The trial court construed §5103 to impose a promptness requirement, and determined the seven month delay to have been excessive. Thus, the court issued an order granting Hospital's preliminary objection and striking the transfer of the case from federal court. The Collinses appealed.

On appeal, the Collinses contend that no timeliness requirement is imposed by the statute, and that, therefore, notwithstanding the seven month delay, the trial court erred by concluding that the filing of the praecipe was not sufficiently prompt. In response, Hospital contends that a promptness requirement is imposed by this court's

decision in *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), *appeal denied* 527 Pa. 650, 593 A.2d 422 (1991).

[1] In *Williams*, this court held that if a matter is originally filed within the statute of limitations in federal court but is dismissed for lack of jurisdiction, a litigant may effect transfer of the action to a state court by complying with the provisions of 42 Pa.C.S. § 5103(b), and the state court will treat the matter as if it were originally filed in the state court, despite the fact that the federal court took no action to transfer the case or take any other action.[1].

We also held that dismissal of the action by the trial court was not appropriate even though the plaintiffs had failed to file a *certified* transcript of the final judgment of the United States court and related pleadings until seven months after the federal court granted the motion to dismiss. Given the dearth of case law interpreting this statute and the fact that Appellants partially complied with the statute just 14 days after the case was dismissed by filing a certified copy of the order dismissing the action along with a new complaint, identical to the complaint filed in federal court, we held that dismissal of the complaint for lack of promptness would be unduly harsh. We also stated that to protect the timeliness of an action a litigant must promptly file a certified copy of the transcript of the

---

1 The dissent claims that this case is not included within the scope of § 5103 because we must read this section to allow transfer only when the transferring court lacks jurisdiction over the entire matter, which is defined in 42 Pa.C.S. § 102 as an action, proceeding, or appeal. Because the transferring court had jurisdiction over the matter, at least until the Federal claim was resolved, the dissent argues that § 5103 cannot be used to toll the statute and effect transfer to the state court.

However, the purpose of the Federal-State transfer statute would be frustrated by such a construction. To hold otherwise would require the filing of State protective actions every time a federal claim with pendant state claims is filed in Federal court on the off chance that if the federal claim is resolved, the litigant will be barred from pursuing the state claim. This is the very problem, the elimination of duplication of effort, which this statute was designed to prevent.

Furthermore, it seems equally logical to construe the language of this statute to include cases with facts "similar" to those present here. After all, once a federal claim is resolved, the entire "matter" or "action" before the federal court is a state "action" made up of state claims, and therefore when the federal court dismisses the "matter" for lack of jurisdiction, the provisions of § 5103(b) may be used to effect transfer of the action.

final judgment of the federal court along with a certified copy of the pleadings in state court.

In the instant case the Appellants gave no indication of their intention to pursue their state claims for nearly seven months after the federal court's Order of Dismissal. Furthermore, after *Williams*, the Appellants cannot claim that because of a lack of interpretive case law under § 5103, they did not know what was required of them. Therefore, we hold that Appellant's actions were not prompt, and the order striking the transfer was proper.

We find Appellees' analogy with the case law that has developed regarding the writ of summons or complaint and then failing to effect service on the defendant persuasive. *Lamp v. Heyman*, 469 Pa. 465, 366 A.2d 882 (1976); *Robinson v. Trenton Dressed Poultry* Co., 344 Pa.Super. 545, 496 A.2d 1240 (1985). Beginning with *Lamp*, our courts have held that if a plaintiff commences an action by writ of summons and then does not attempt service within 30 days by complying with the local rules concerning delivery of the summons to the sheriff within that time, then that failure to make a good faith effort to notify the defendant will serve to nullify both the commencement of the action and the tolling of statute of limitations. This rule of promptness established by the courts was held to be consistent with the policy of avoiding stale claims, making the processes of justice as speedy and efficient as possible, and preventing the possibility of the plaintiff retaining exclusive control over the action for a period in excess of the statute of limitations.

When a litigant transfers an action under §5103(b), this section, like the filing of a writ of summons, provides protection from the bar of the statute of limitations. This protection comes into play in the situation where the litigant has timely filed an action, such that notice to the defendant is sufficient for statute of limitations purposes, but as the federal court subsequently determines, has filed in the wrong court. If, however, a litigant fails to promptly transfer the action to the appropriate court, then the litigant abuses that protection, (as was done prior to *Lamp* by parties commencing actions by writ of summons,) subverts the policies underlying the statute of limitations, and undermines the speedy and efficient process of justice.

[2] Therefore, we hold that litigants must act promptly in transferring their actions which have been dismissed for lack of jurisdiction by the Federal courts. We again ask, as we did in *Williams, supra*, 395 Pa.Super. at 511, n. 1, 577 A.2d 907, that our Legislature will see fit in the future to include a specific time requirement of 30 days in the provisions of 42 Pa. C.S.A. § 5103.

Order is affirmed and jurisdiction relinquished.

JOHNSON, J., files a dissenting opinion.

JOHNSON, Judge, dissenting.

I am unable to conclude that the statute dealing with the transfer of erroneously filed matters has any applicability to the facts presented in the within appeal. Nor do I find any support for my esteemed colleagues' conclusion that the purpose of the transfer statue is to eliminate duplication of effort. By its express terms, the statute under review requires that the transferring court be without jurisdiction over the matter before the authorization to transfer is triggered. There is absolutely nothing in the certified record of this case to even suggest that the federal district court was without jurisdiction over the matters involved. Since I find the construction placed upon the statute by my colleagues to be both strained and fraught with the potential for future mischief, I must dissent.

I begin by stating that the most distinguished trial judge arrived at the right conclusion by striking the praecipe which sought to transfer this action from the federal district court. However, I believe that the focus on the *timeliness* of the attempted transfer-by the trial court by the litigants, and by my colleagues in the majority-is misplaced.

We have been asked to determine whether, under *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), *appeal denied* 527 Pa. 650, 593 A.2d 422 (1991), the plaintiffs' seven month delay precludes a transfer of their state law claims pursuant to Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103. I conclude that *Williams* is inapplicable to the present case and that the claims presented here were not transferable under §

5103 regardless of the plaintiffs' delay. The decision of the trial court was correct, albeit for what I believe to have been the wrong reasons.

Where a court makes a correct ruling, order, decision, judgment or decree, but assigns an erroneous reason for its action, an appellate court will affirm the action of the trial court and assign the proper reason therefor. *Taylor v. Churchill Valley Country Club*, 425 Pa. 266, 268, 228 A.2d 768, 769 (1967); *Sherwood v. Elgart*, 383 Pa. 110, 117 A.2d 899 (1955); *Coatesville Development Company v. United Food and Commercial Workers, AFL-CIO*, 374 Pa.Super. 330, 338, 542 A.2d 1380, 1384 (1988). This approach however is only appropriate where the correct basis for the ruling, order, decision, judgment or decree is clear upon the record. *Bearoff v. Bearoff Brothers, Inc.* 458 Pa. 494, 501, 327 A.2d 72, 76 (1974). I would submit that the correct basis for the striking of the transfer praecipe is, indeed, clear upon this record.

The docket entries, along with certified copies of the pleadings and other documents filed in the case of Collins v. Greene County Memorial Hospital, at Civil Action No. 88-967, in the United States District Court for the Western District of Pennsylvania, have been certified from the record by Catherine D. Martrano, Clerk. they were filed of record, on March 19, 1991, at A.D. No. 186 of 1991 in the Court of Common Pleas of Greene County. All of these pleadings were before the trial court when it entertained the hospital's preliminary objections and motion for summary judgment.

Those certified documents reveal that the case originated in federal district court on April 29, 1988 upon the filing of a complaint. Jurisdiction in the court was alleged to be found by virtue of Title VII of the Civil Rights Act of 1964, as amended at 42 U.SC. § 2000e *et seq.* That jurisdictional claim was formally contested in boilerplate defenses by the defendant hospital (Answer to Complaint filed July 1, 1988, Eighth, Twelfth and Fourteenth Defense(s)) and by the defendant doctor (Motion to Dismiss filed July 18, 1988, Sections I and II). In any event, the jurisdictional issue was settled no later than May 22, 1990 when District Judge Gustave Diamond (1) held a hearing on all outstanding motions, (2)

denied all outstanding motions to dismiss, and (3) decreed that discovery would be completed within 120 days after the plaintiff's deposition.

The Title VII portion of the action was concluded favorably to the plaintiffs. The amount of the settlement in favor of the plaintiffs is not spread upon the certified record. Nevertheless, that record establishes that, on October 29, 1990, after the case had been in litigation for exactly two and one-half years, the federal district judge awarded attorneys' fees to the plaintiffs totaling $22,600 along with costs in the amount of $1,082.38. The plaintiffs were the prevailing parties. 42 U.S.C. § 1988. Updated Stipulation of the parties, filed October 29, 1990 at No. 88-967.

On this appeal, my colleagues assume and assert that the action pursued at No. 88-967 was dismissed for lack of jurisdiction. The certified record belies that assertion. In dismissing the plaintiffs' claims which were remaining following the settlement of the Title VII claim, United States District Judge Diamond stated, in pertinent part:

> On August 17, 1990, we entered judgment on plaintiff Jean Collins' Title VII claims against defendant ... "Hospital" upon the consent of the parties. Thus, the only claims which remain before us are the plaintiffs' pendant [sic] state claims against the Hospital and against the pendant party ... "Das".
>
> Having given the matter due consideration, *the court will exercise its discretion in favor of dismissing the pendant claims* given that judgment has been entered on the sole claim over which we have independent jurisdiction. First,..., we conclude that *it is inappropriate for us to retain jurisdiction* over claims asserted against defendant Das after judgment has been entered on the claims over which we had independent jurisdiction.... We note also that some of the claims remaining are those asserted by plaintiff Terry Collins, a non-diverse party who has not asserted any federal claims against the defendants. These circumstances, coupled with the entry of judgement on the only federal claims in this suit, convince us that *a decision to not exercise "pendant party jurisdiction"* [sic] over defendant Das *is appropriate*.

> Second, *we note that the decision on whether to exercise jurisdiction over pendant claims lies in the sound discretion of the district court....*
>
> Accordingly, for the reasons set forth above, IT IS ORDERED that the plaintiffs' remaining claims against defendant Greene County Memorial Hospital and their claims against defendant Arunava Das be, and hereby are, dismissed.
>
> s/Gustave Diamond
> United States District Judge

Memorandum Order, Diamond, D.J., August 23, 1990, pages 1-3, filed August 24, 1990 at No. 88-967, *certified copy filed* March 19, 1991 at Civil Division A.D. No. 186, 1991 (emphasis added).

There is absolutely nothing in the Memorandum Order itself or in the federal district court docket entries to support an assertion that the case filed at No. 88-967 was dismissed for lack of jurisdiction. To the contrary, Judge Diamond correctly observed that pendent jurisdiction is a doctrine of discretion, and the power in federal courts to hear both state and federal claims, assuming substantiality of the federal issues, need not be exercised in every case in which it is found to exist. *United Mine Workers of America v. Gibbs*, 383 U.S. 715, 725-26, 86 S.Ct. 1130, 1138-39, 16 L.Ed.2d 218, 227-28 (1966).

Although Judge Diamond stated, by way of dictum in his Memorandum Order quoted above, that the plaintiffs would not suffer the prejudice of having a statue of limitations problem, following dismissal, in light of 42 Pa.C.S. § 5103(b), there is nothing included in the record to either explain or support that assertion. Moreover, Judge Diamond would have been aware that no one may properly rely upon what the federal district court might say as persuasive on any question of Pennsylvania law so long as our Pennsylvania Supreme Court has not ruled upon the legal question. *Aceto v. Zurich Insurance Company*, 440 F.2d 1320 (3rd Cir.1971).

I conclude, after a careful review of the entire record, that the plaintiffs brought their action in the federal district court, by

choice, on April 29, 1988. After two and one-half years of litigation as evidenced by the certified record the plaintiffs secured a favorable settlement of their Title VII claim. After that claim was settled, Judge Diamond dismissed the remaining claims on August 23, 1990, finding that the further exercise of pendent jurisdiction was not appropriate. The Memorandum Order by which Judge Diamond dismissed the pending state claims does not permit an inference that the federal district court found itself to be without jurisdiction. To the contrary, its earlier order of May 22, 1990 dismissing all pending pretrial motions established that the district court deemed itself to have jurisdiction over all the claims then pending.

With these facts as background, this court must then consider the proper application of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103, to the attempted transfer now under review.

The majority would argue that the purpose of the act which they term the Federal-State transfer statute is to obviate the transfer of actions from federal courts where pendent state claims are involved. I have found nothing in the history of this statute to support that claim. To the contrary, the enactment of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103, and its various parts can lead but to one conclusion: From its inception, the statute has been intended to apply only where a case has been erroneously filed in the wrong court.

The present Section 5103(a) first appeared as Section 503(b) of the Appellate Court Jurisdiction Act of 1970. In its original form, the subsection was enacted as follows:

Section 503. Waiver of Objections to Jurisdiction; Transfer of Cases.

(a) .....

(b) *If an appeal or other matter is erroneously* taken to or *brought in a court which does not have jurisdiction of the appeal* or other matter, *the court* shall not quash such appeal or dismiss the matter, but *shall transfer the record thereof*, at the cost of the

> appellant, petitioner or plaintiff, *to the proper court* of this Commonwealth, *where the appeal* or other matter *shall be treated as if originally filed* in the court *on the date erroneously filed in the other court.*

Act No. 223 of 1970, P.L. 673, art. V, § 503 at P.L. 679 (formerly 17 P.S. § 211.503) (emphasis added). The language of the subsection makes it clear that Section 503(b), at its inception, was intended to cover only those cases where a matter had been erroneously lodged in the wrong court.

Prior to the enactment of the Appellate Court Jurisdiction Act, the Second Class Township Law of 1933 contained a similar section that was re-enacted without change in 1947, and has since been incorporated into Section 5103(a). As originally enacted, the 1933 Law contained this section, in its entirety:

> **Section 1049**. Appeals to the wrong Court.-
> Should any appeal under this article be made *to the wrong court*, such court shall certify the appeal to the court *to which it should have been taken.*

Act No. 69 of 1933, P.L. 103 art. X § 1049 at P.L. 156 (formerly 53 P.S. §66049), reenacted without change, Act No. 567 of 1947 P.L. 1481, Section 15, re-enacting, revising and amending Second Class Township Law Sections 1020 to 1101 inclusive, at P.L. 1558.

Moreover, the 1965 act providing for the transfer of any cause mistakenly appealed to any court from a judgment of a magistrate or justice of the peace compels the same conclusion. The 1965 act, in its entirety, provided:

> Section 1. Whenever an appeal from a judgment of a magistrate or justice of the peace is taken to any court *instead of the court to which it should have been taken*, the appeal shall not thereby be lost, but the court to which the appeal was taken shall transfer the cause to the court *to which the appeal should properly have been taken.*

Act No. 156 of 1965, P.L. 298, § 1, (formerly 42 P.S. § 929) (emphasis added).

The 1933/1947 act and the 1965 act set forth above, as well as Section 503 of the Appellate Court Jurisdiction Act of 1970, are all now lodged in Section 5103 of the Judicial Code of 1976, as amended.

Whether we look to the catchlines of the Pamphlet Laws or review the content of each act, only one conclusion seems possible. All of the acts dealing with transfer of matters from one court to another, including the 1933, 1947, 1965, 1970 and 1976 acts, require that a matter be erroneously filed in the wrong court before a transfer is authorized under the act.

The headings prefixed to sections of a statute shall not be considered to control but may be used to aid in the construction thereof. 1 Pa.C.S. § 1924; *Fedor v. Borough of Dormont*, 487 Pa. 249, 254 n. 3, 409 A.2d 334, 337 n. 3 (1979). Each time the legislature has passed legislation affecting Section 5103, it has used the identical catchline: Transfer of erroneously filed matters. *See* Act 1976-142, P.L. 586 at P.L. 695; Act 1978-53 (Judiciary Act Repealer Act), P.L. 202 at P.L. 397; Act 1982-326 (JARA Continuation Act of 1982), P.L. 1409 at P.L. 1422. Even before that more recent history, the legislature spoke only in terms of "Appeals to the Wrong Court", see Act 1933-69, P.L. 103 at P.L. 156; Act 1947-567, P.L. 1481 at P.L. 1558; or "Whenever an appeal ... is taken to any court instead of the court to which it should have been taken ..." Act 1965-156, P.L. 298.

In construing Section 5103 of the Judiciary Code, the legislative intent controls. The object of all interpretation and construction of statutes is to ascertain and effectuate the intention of our General Assembly. 1 Pa.C.S. § 1921(a). However, when the words of a statute are clear and free from all ambiguity, the letter of it is not to be disregarded under the pretext of pursuing its spirit. 1 Pa.C.S. § 1921(b).

When I turn to the statute in its present form, which has not undergone any change since passage of the JARA Continuation Act of 1982, I find it to be crystal clear and free from any ambiguity.

In the JARA Continuation Act of 1982, Act 1982-326, P.L. 1409, the legislature continued to use the catchline, "Transfer of erroneously filed matters." See P.L. 1409 at P.L. 1422. Under both subsection (a) and subsection (b) of Section 5103, the plaintiffs are barred from effecting transfer.

Subsection (a) of Section 5103 provides, in pertinent part:

§ 5103. Transfer of erroneously filed matters.

(a) General rule.-*If an* appeal or *other matter* is taken to or *brought in a court* ... of this Commonwealth *which does not have jurisdiction of the* appeal or other *matter*, the court ... shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth.....

42 Pa.C.S. § 5103(a) (emphasis added). I can only read the emphasized clause-"if a matter is brought in a court which does not have jurisdiction"-as a proviso. Provisos shall be construed to limit rather than to extend the operation of the clauses to which they refer. 1 Pa.C.S. § 1924. The right to transfer the record therefor must depend upon the matter having been erroneously filed. Under subsection (a), the plaintiffs on this appeal could not prevail.

When we proceed to examine subsection (b), the same result is dictated. That subsection provides, in pertinent part:

(b) Federal cases.-

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth.... Where a matter is filed in any United States court for a district embracing any part of this Commonwealth *and the matter is dismissed by the United States court for lack of jurisdiction*, any litigant in the matter filed may

> transfer the matter to a court ... of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

42 Pa.C.S. § 5103(b) (emphasis added). There are two independent reasons contained in subsection (b) militating against a transfer by the plaintiffs in this case. If the matter is transferred by the United States court, itself, subsection (a) is mandatory in its application, thereby bringing into play the proviso discussed above. On the other hand, in order for a litigant to transfer the matter, as may have been attempted in this case, the statute is equally clear that it requires the matter must have been dismissed for lack of jurisdiction. Again, the proviso in subsection (b) can only be understood to limit rather than to extend the operation of the transferring clause to which it refers. 1 Pa.C.S. § 1924.

I conclude that Section 5103 is only applicable in those situation where it can be established that the action was originally filed in the wrong court. In this case, extremely competent plaintiffs' counsel elected to file the sexual harassment suit in a federal district court and pursue that venue for two and one-half years. Counsel secured a favorable result for their clients. Plaintiffs, in their Appellants' Brief, assert that Judge Diamond entered "a Memorandum Order dismissing Plaintiffs' remaining state claims for lack of subject matter jurisdiction." That assertion simply is not borne out by the plain language of the Order quoted above.

The action was dismissed not for *lack of jurisdiction* but because the federal district court, in proper exercise of its discretion, determined that it would decline to *continue* the exercise of jurisdiction which it had previously found no later than May 22, 1990. The state and federal claims did derive from a common nucleus of operative fact. A review of the complaint filed originally in the federal district court establishes that the claims raised by this suit would ordinarily be expected to be tried in one judicial proceeding. The plaintiffs pled that the physician-defendant had forced the wife-plaintiff to perform an involuntary deviate sexual act, that the hospital-defendant had violated its obligations under the 1964 Civil Rights Act, that the hospital had been negligent in its hiring, placement and supervision of the doctor-defendant, and that the wife-plaintiff had undergone an assault, a battery and intentional inflic-

tion of emotional distress, all arising from her attempts to thwart or terminate the sexual harassment. All of the acts complained of involve the relationship between the plaintiffs, the doctor-defendant and the hospital-defendant. Given the substantiality of the federal, civil rights claim set forth in Count I of the complaint filed in the federal district court, there can be no question but that the district court had the power, that is to say, the *jurisdiction*, to hear the entire case. *United Mine Workers of America v. Gibbs, supra.*

Section 5103, by its terms, permits a transfer where a "matter is taken to or brought in a court ... *which does not have jurisdiction of the ... matter*". Here, the action was first brought in the federal district court. Under the law set forth in *Gibbs*, that court *had* jurisdiction over the matter. Therefore, this case is not included within the scope of § 5103.

This result is further supported by our legislature's use of the term "matter" to describe what may be transferred under this statute. A "matter" is defined to be "an action, proceeding or appeal." 42 Pa.C.S. § 102. an "action" is "[a]ny action at law or in equity." *Id.* A "proceeding" is defined to include "every declaration, petition or other application which may be made to a court under law or usage or under special statutory authority, but the term does not include an action or appeal." *Id.* This legislative language forces the conclusion that § 5103 only provides authority to transfer the entire action as a result of the transferring court's lack of jurisdiction over the entire case. That section does not permit nor does it anticipate the transfer of individual claims. Therefore, even if the Collinses' attempt to transfer via the statute would be considered as having been timely filed, one must conclude on this independent ground, alone, that the transfer was not permitted by the statute.

The parties rely extensively on *Williams v. F.L. Smithe Machine Company, Inc., supra,* for their arguments regarding the existence of a "promptness" requirement. However, *Williams* is inapplicable to this case. There, a transfer from the federal district court to the state court was attempted following the federal court's dismissal for lack of jurisdiction over the case. That dismissal was based upon a lack of diversity between the parties. There was never any question in *Williams* about the lack jurisdiction. Because the federal

court in *Williams* never had jurisdiction over the "matter," that transfer was properly within the terms of Section 5103. Here, the federal court had jurisdiction to enter an order as to all of the claims originally presented to it. Therefore, it cannot be said that the matter was filed with a court that did not have jurisdiction. Accordingly, *Williams* is inapplicable to the instant case.

I began by suggesting that the reasoning set forth by my colleagues presented the potential for future mischief. It must be borne in mind that the only concern of the legislature in each and all of the separate acts not incorporated into Section 5103 was to provide a vehicle by which cases *mistakenly filed* in the *wrong court* could be transferred to the court in which they should have initially been brought. Common experience should instruct us that the time involved in determining that a court is completely without jurisdiction in a matter is normally relatively short.

The majority would raise the specter of the "need" to file state protective actions. An examination of the statute demonstrates that the legislature has already considered that contingency in the only factual situations intended to be covered by the act. Section 5103(b)(1) already provides that, where a matter has been erroneously filed:

> In order to preserve a claim under Chapter 55 (relating to limitation of time), a litigant who timely commences an action or proceeding in any United States court ... is not required to commence a protective action in a court ... of this Commonwealth. Where a matter is filed in any United States court ... *and the matter is dismissed ... for lack of jurisdiction*, any litigant in the matter filed may transfer the matter to a court ... of this Commonwealth ...

42 Pa.C.S. § 5103(b)(1) (emphasis added). The majority would ignore the clear, often repeated proviso that proclaims lack of jurisdiction as the prerequisite for transfer eligibility. I submit that the rules of statutory construction set forth in the Pennsylvania Consolidated Statutes prohibit the result sought by my colleagues.

I earnestly believe that the words of this statute are clear and free from all ambiguity. 1 Pa.C.S. § 1921(b). Even if it could be argued that the words lack clarity-an assertion which I believe is unsupportable-the legislature has declared through the statute's catchline that the object to be obtained is the transfer of *erroneously filed matters*. The mischief to be remedied, originally, was the loss of the right to pursue an appeal because the appeal would have been filed in the wrong tribunal. The former laws on this subject are uniform in declaring that. Consideration of these matters leads to the same conclusion: Section 5103 was never intended to deal with matters properly filed in a federal district court where the plaintiffs receive a settlement on the federal claim in the district court and then attempt to transfer the balance to the state courts. 1 Pa.C.S. § 1921(c).

No reason is advanced by appellants as to why they elected to attempt a transfer of some of their claims two and one-half years after the suit was originally brought. There has been no suggestion that the plaintiffs were in any way prevented from pursuing all of their claims in the district court. I agree with the appellants that the language of Section 5103 is both clear and unambiguous. In the face of the clear language requiring an erroneous filing, I am at a loss in locating the statutory language undergirding my colleagues' decision.

Because I would determine that the requirement for an erroneous filing has not been met, I do not reach the question of whether the Memorandum Order of Judge Diamond entered August 23, 1990 meets the requirement for a "final judgment of the United States court" as required under subsection (b)(2) of Section 5103 of the Judicial Code, 42 Pa.C.S. § 5103(b)(2).

I would leave to the wisdom and experience of the legislature whether special provisions should be enacted for those plaintiffs who would like to have it both ways. I find the present provisions adequate to protect parties who have mistakenly filed a matter in the wrong tribunal. The order dismissing the praecipe for transfer should indeed be affirmed, not as a result of any promptness analysis but because Section 5103 is inapplicable. The history of the statutory section and its wording demonstrate that it was not

intended to be used as the appellants would have this court interpret it. I therefore register my dissent.

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
vs.	)	A.D. No. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

APPEARANCES:

JOSEPH J. HINCHLIFFE, ESQUIRE, Attorney for the Plaintiffs

THOMAS M. MADIGAN, ESQUIRE, Attorney for Defendant Greene County Memorial Hospital

FREDERICK W. THIEMAN, ESQUIRE, Attorney for Defendant, Arunava Das, M.D.

OPINION

The plaintiffs brought an action in the United States District Court for the Western District of Pennsylvania on April 29, 1988. This suit comprises a federal issue, based an the Civil Rights Act of 1964, and several state issues, which were in federal court by way of pendant jurisdiction. On August 17, 1990, the district court entered a judgment and final decree on the federal issue, and six days later dismissed the state claims for lack of jurisdiction.

From August 23, 1990 until March 19, 1991, the plaintiffs took no action. On March 19, 1991, the plaintiffs filed a certified copy of the complaint, pleadings, and final judgment from the U.S. District Court in this court pursuant to 42 Pa. C.S.A. §5103 together with a Praecipe to Transfer.

The defendants now file preliminary objections, or in the alternative, a motion for summary judgment, to the transfer as not in keeping with the transfer statute. They also raise the statute of limitations by way of preliminary objections, or in the alternative, a motion for summary judgment.

A motion for summary judgment is appropriate only after the pleadings are closed (Pennsylvania Rule of Civil Procedure 1035, 42 Pa.C.S.A.), therefore the defendants' motion for summary judgment will not be considered.

An issue of a violation of a statute of limitations cannot be raised other than by a responsive pleading as new matter (Pennsylvania Rule of Civil Procedure 1017(b)(4) and note, 42 Pa. C.S.A.), therefore that objection is denied.

The remaining issue of the refiling not being in conformity to law (Pennsylvania Rule of Civil Procedure 1017(b)(2), 42 Pa.C.S.A.) must be determined. In order to be in conformity with the transfer statute, 42 Pa.C.S.A. §5535, the plaintiffs must have filed in this court a certified copy of the complaint, the docket entries, and the final resolution dismissing the case from federal court and must have done so promptly.

The defendants do not question the correctness of the documents, only that they were not promptly filed. "Prompt" as a term in this statute has never been defined. In analyzing this word and its usefulness in the statute, it is important to note that the only other action required of the plaintiff is the filing of a certified copy of the federal court file. This would be neither time consuming nor difficult. Further, since this particular case had its federal question settled by agreement of the parties, the plaintiffs would not have been surprised by dismissal by the district court.

The effort and time needed to file in state court pursuant to the statute is less than would be expected in filing an amended pleading or filing a responsive pleading after disposition of preliminary objections. In both cases, the Pennsylvania Rules of Civil Procedure allot twenty (20) days. Compared with the approximately two hundred (200) days taken to file in the present case, there is an implication that the plaintiffs' filing was not prompt. Further, the record is devoid of a justification for the delay.

In conclusion, as a matter of statutory construction, the filing vas not "prompt," as mandated by transfer statute, the sole vehicle for the plaintiffs to transfer their case from federal court to this court.

IN THE COURT OF COMMON PLEAS OF GREENE COUNTY, PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
vs.	)	A.D. No. 186 of 1991
GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

ORDERS

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST:

/s/ Richard Rosendale
PROTHONOTARY

BY THE COURT:

/s/ H. Terry Grimes
PRESIDENT JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

JEAN COLLINS, an individual; and TERRY COLLINS, her husband,	)	
Plaintiffs,	)	
v.	)	Civil Action No. 88-967
GREEN COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,	)	
Defendants.	)	

MEMORANDUM ORDER

AND NOW, this 23rd day of August, 1990:

On August 17, 1990, we entered judgment on plaintiff Jean Collins' Title VII claims against defendant Green County Memorial Hospital ("Hospital") upon the consent of the parties. Thus, the only claims which remain before us are the plaintiffs' pendant state claims against the Hospital and against the pendant party Arunava Das ("Das").

Having given the matter due consideration, the court will exercise its discretion in favor of dismissing the pendant claims given that judgment has been entered on the sole claim over which we have independent jurisdiction. First, in light of the recent Supreme Court decision of Finley v. United States, 104 L.Ed.2d 593 (1989), we conclude that it is inappropriate for us to retain jurisdiction over claims asserted against defendant Das after judgment has been entered on the claims over which we had independent jurisdiction. Das was brought into this suit as a "pendant party," and Finley

sharply circumscribes federal court exercise of such jurisdiction. We note also that some of the claims remaining are those asserted by plaintiff Terry Collins, a non-diverse party who has not asserted any federal claims against the defendants. These circumstances, coupled with the entry of judgment on the only federal claims in this suit, convince us that a decision to not exercise "pendant party jurisdiction" over defendant Das is appropriate.

Second, we note that the decision on whether to exercise jurisdiction over pendant claims lies in the sound discretion of the district court. E.g., United Mine Workers v. Gibbs, 383 U.S. 715, 726 (1966). In exercising that discretion, we note that we have determined above that we should not exercise jurisdiction over defendant Das in light of Finley. Thus, the plaintiffs and defendants would be threatened with a multiplicity of actions if we were to retain jurisdiction over the claims against the Hospital. Furthermore, we note that the plaintiffs will not suffer the prejudice of having a statute of limitations problem in light of 42 Pa.C.S.A. § 5103(b), which will permit them to pursue the claims asserted here in the courts of the Commonwealth. Thus, we conclude that there is no potential prejudice to the plaintiffs which warrants our exercising our discretion in favor of retaining jurisdiction over plaintiffs' pendant claims.

Accordingly, for the reasons set forth above,

IT IS ORDERED that the plaintiffs' remaining claims against defendant Green County Memorial Hospital and their claims against defendant Arunava Das be, and hereby are, dismissed.

/s/ Gustave Diamond
United States District Judge

(2)

Supreme Court, U.S.
FILED
SEP 7 1994
OFFICE OF THE CLERK

No. 94-255

In The

Supreme Court of the United States

October Term, 1994

JEAN COLLINS, an individual, and TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Supreme Court of the United States has jurisdiction to review the Supreme Court of Pennsylvania's interpretation and application of a state procedural statute governing the transfer of state law claims from federal to state court upon dismissal by the federal court for lack of subject matter jurisdiction.

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APPENDIX

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Appendix C — Brief for Appellants in the Supreme Court of Pennsylvania, Western District 21a

STATEMENT OF JURISDICTION

Respondent Greene County Memorial Hospital (hereinafter "the Hospital" or "Respondent") contends that this case involves purely an issue of state law; specifically, the interpretation of a Pennsylvania statute allowing for the transfer to state court of actions dismissed from the federal district courts in Pennsylvania for lack of subject matter jurisdiction. The case raises no federal constitutional or statutory issues. As a result, the Supreme Court of the United States lacks jurisdiction to review the decision of the Supreme Court of Pennsylvania in this case.

CONSTITUTIONAL PROVISIONS INVOLVED

The Hospital contends there are no provisions of the United States Constitution at issue.

COUNTER-STATEMENT OF THE CASE

Jean and Terry Collins (hereinafter "the Collins" or "Petitioners") originally filed this action in the United States District Court for the Western District of Pennsylvania on April 29, 1988. (*Jean Collins, et ux. v. Arunava Das, M.D. and Greene County Memorial Hosp.*, C.A. 88-967). The federal complaint alleged that Jean Collins was sexually assaulted by Dr. Arunava Das at the Hospital on October 8, 1986. At the time of the alleged incident, Jean Collins was an employee of the Hospital and Dr. Das was a physician with staff privileges. The complaint asserted a cause of action against the Hospital under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000(e) (hereinafter "Title VII"), and common law claims of negligence and intentional infliction of emotional distress.

On July 18, 1990, the Hospital filed and served upon the Collins an Offer of Judgment pursuant to Fed. R. Civ. P. 68. The

Hospital consented to the entry of certain injunctive relief requiring the promulgation and publication of a policy explicitly prohibiting sexual harassment in the workplace and agreed to the payment of $5,000 to Jean Collins to compensate her for any wage loss incurred as a result of the October 8, 1986, incident. The Rule 68 Offer of Judgment was accepted by Petitioners by letter dated August 9, 1990.

On August 17, 1990, the Honorable Gustave Diamond, Judge of the United States District Court for the Western District of Pennsylvania, entered an Order of Judgment and Final Decree which incorporated the terms of the Rule 68 Offer. On August 23, 1990, Judge Diamond entered an Order dismissing the Collins' remaining pendent state law claims for lack of subject matter jurisdiction. In his opinion, Judge Diamond noted, "the plaintiffs will not suffer the prejudice of having a statute of limitations problem in light of 42 Pa. Cons. Stat. Ann. § 5103(b), which will permit them to pursue the claims asserted here in the courts of the Commonwealth." (A.28-29)[1]

Plaintiffs did not appeal the order dismissing their pendent state law claims. They then took no steps to otherwise pursue their state law claims until March 19, 1991, nearly seven months later, when they filed a Praecipe to Transfer in the Court of Common Pleas of Greene County pursuant to 42 Pa. Cons. Stat. Ann. § 5103(b), which provides in pertinent part:

> § 5103 Transfer of erroneously filed matters
>
> (a) General rule. — If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth

---

1. References to the Appendix to the Collins' Petition for Writ of Certiorari are designated as "(A.__)."

which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.

(b) Federal cases. —

(1) Subsection (a) shall also apply to any matter transferred or remanded by any United States court for a district embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitations of time), a litigant who timely commences an action or proceeding in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court

> or before a district justice of this Commonwealth. Where a matter is filed in any United States court for a district embracing any part of this Commonwealth and the matter is dismissed by the United States court for lack of jurisdiction, any litigant in the matter filed may transfer the matter to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).
>
> (2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth . . . .

The Hospital filed Preliminary Objections seeking dismissal of the Collins' transfer as untimely in light of the Superior Court of Pennsylvania's decision in *Williams v. F.L. Smithe Mach. Co.*, 395 Pa. Super. 511, 577 A.2d 907 (1990), *alloc. denied*, 593 A.2d 418 (Pa. 1991), in which the court held that in order to protect the timeliness of the initial filing in federal court a plaintiff must *promptly* comply with the provisions of § 5103(b). On June 7, 1991, the Honorable H. Terry Grimes, President Judge of the Court of Common Pleas of Greene County, Pennsylvania, sustained the Hospital's Preliminary Objections and dismissed the Praecipe to Transfer as untimely. Petitioners thereafter appealed to the Superior Court of Pennsylvania.

On November 2, 1992, the Superior Court affirmed the dismissal of the Collins' Praecipe to Transfer on the grounds that it was untimely filed. The court's opinion was published at 419 Pa. Super. 519, 615 A.2d 760 (1992). The Collins then petitioned to the Supreme Court of Pennsylvania for review, which was granted on August 10, 1993. On April 13, 1994, following oral argument and extensive briefing on both sides, the Pennsylvania Supreme Court affirmed, per curiam, without opinion, the decision of the Superior Court of Pennsylvania. One justice dissented. The per curiam order of affirmance and the dissenting opinion were published at __ Pa. __, 640 A.2d 379 (1994). The Collins requested reargument which was denied by the state Supreme Court on May 11, 1994.

The Collins then filed their Petition for Writ of Certiorari (hereinafter "Petition") in this Court.

SUMMARY OF THE ARGUMENT

The Supreme Court of the United States does not have jurisdiction under 28 U.S.C. § 1257 over this case for two reasons: first, there is no substantial federal question, and second, no federal question was properly "pressed and passed upon" by the Pennsylvania courts.

There is no substantial federal question because this case involves the interpretation and application by the Pennsylvania courts of a state procedural statute. The statute at issue allows for the transfer to state court of actions dismissed from federal district courts in Pennsylvania for lack of subject matter jurisdiction. If an action is properly transferred, the date of the initial filing in federal court will be treated as the date of commencement of the action for purposes of the statute of limitations. This case simply does not raise a substantial federal issue.

Although Petitioners claim that they have been deprived of a jury trial under the Seventh Amendment, this amendment has not been incorporated into the Fourteenth Amendment and thus is not applicable to the states. Petitioners also claim that they have been deprived of their right to due process of law under the Fifth and Fourteenth Amendments, but this is simply an attempt to transform an issue of state law into a "constitutional question." State courts are the ultimate expositors of state law, and purely state law decisions cannot be overturned, or even reviewed, by this Court.

Further, this Court does not have jurisdiction over this case because no federal question was properly pressed and passed upon in the Pennsylvania courts. The only statement of any federal constitutional issue by the Collins was made in their brief to the Pennsylvania Supreme Court in which they claimed "it was simply unfair and thus a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction." This passing reference to "due process" is insufficient to preserve a constitutional issue for review by this Court.

Finally, even if this Court would determine that it had jurisdiction over this case, the decisions of the Pennsylvania Superior and Supreme Courts were proper and thus do not justify review.

REASONS FOR DENYING THE WRIT

I.

THIS CASE PRESENTS NO SUBSTANTIAL FEDERAL QUESTION, AND THE UNITED STATES SUPREME COURT THUS LACKS JURISDICTION TO REVIEW THE DECISION OF THE SUPREME COURT OF PENNSYLVANIA.

This Court's certiorari jurisdiction over decisions from state courts is derived from 28 U.S.C. § 1257, which provides in pertinent part as follows:

> § 1257. State courts; certiorari
>
> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or law of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

28 U.S.C. § 1257(a) (1993). This Honorable Court should not grant certiorari because this case simply does not present a "federal question" within the meaning of § 1257.

The case of *Millingar v. Hartupee*, 73 U.S. (6 Wall.) 258 (1867), is viewed as the first statement of the doctrine that a substantial federal question is a prerequisite of this Court's jurisdiction in appeals from state courts. Ulman and Spears, *"Dismissed for Want of a Substantial Federal Question"*, 20 B.U.L. Rev. 501, 507 (1940). In *New Orleans v. New Orleans Water Works Co.*, 142 U.S. 79, 87 (1891), this Court expounded upon the principle set out in *Millingar*, noting that "the bare averment of a federal question is not in all cases sufficient .... [there] must be at least a colorable ground for such averment, otherwise a federal question might be set up in almost any case, and the jurisdiction of this court invoked simply for the purpose of delay."

In *Zucht v. King*, 260 U.S. 174 (1922), certain ordinances requiring vaccination of children who attended public schools were challenged on the grounds that they violated the due process and equal protection clauses of the Fourteenth Amendment. Although this Court noted that "[t]he validity of the ordinances under the Federal Constitution was drawn in question by objections properly taken below," it dismissed the appeal, stating "it is our duty to decline jurisdiction whenever it appears that the constitutional question presented is not ... substantial in character." *Id.* at 176 (citation omitted).

The federal questions alluded to in the Petition for Writ of Certiorari are not substantial. The Collins baldly assert that they have been deprived of their right to a jury trial under the Seventh Amendment without elaboration or citation to authority. The failure to cite to controlling authority is explained by the fact that the right to a civil jury trial encompassed in the Seventh Amendment is not incorporated into the Fourteenth Amendment and thus not applicable to the states. "The Seventh Amendment 'applies only to proceedings in courts of the United States, and does not in any manner whatever govern or regulate trials by jury in

state courts . . . .' " *Linton v. Great Lakes Dredge & Dock Co.*, 964 F.2d 1480, 1488 n. 16 (5th Cir.), *cert. denied*, 113 S. Ct. 467 (1992), *citing, Minneapolis and St. Louis R.R. Co. v. Bombolis*, 241 U.S. 211, 217 (1916).

The Collins also claim they have been deprived of their right to due process of law under both the Fifth and Fourteenth Amendments to the United States Constitution. This claim is similarly enigmatic as the Collins simply state in conclusory fashion that the state Supreme Court's failure to embrace their proffered statutory interpretations constitutes "a violation of due process." Such a transparent attempt to create a federal jurisdiction where none exists must fail. This Court has repeatedly held that state courts are the ultimate expositors of state law, and that it will be bound by their construction, except in extreme circumstances, such as where the state court interpretation of state law is an obvious subterfuge to evade consideration of a controlling federal issue. *Mullaney v. Wilbur*, 421 U.S. 684, 691 and n. 1 (1975).

In *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 163 (1916), this Court roundly rejected an attempt to turn issues of state law into "constitutional questions." As do the Petitioners here, the petitioner in *Enterprise* asserted that the Nebraska Supreme Court's interpretation of certain issues of state law violated its due process and equal protection rights. In rejecting this argument, this Court stated:

> The claim that the court, in disposing of some of the questions, including that of the estoppel, misconceived or misapplied the statutory and common law of the state, and thereby infringed the due process and equal protection clauses of the Fourteenth Amendment, requires but brief notice. *The due process clause does not take up the laws of the several states and make all*

> *questions pertaining to them constitutional questions, nor does it enable this court to revise the decisions of the state courts upon questions of state law* . . . . The questions presented . . . all turned exclusively upon the law of the state, and the state court's decision of them is controlling . . . [Such a] judgment is . . . not open to review by this court.

Id. at 165-66 (emphasis added, citations omitted).

In the case at bar, the Collins argue that the Pennsylvania Supreme Court's affirmance of the lower court's dismissal of their *state law claims* as untimely transferred pursuant to a *state procedural statute* "violates due process." It is beyond peradventure that the interpretation of state procedural statutes is a matter for the highest court of the state and not a matter for review in this Court. This Court should thus deny the Collins' Petition for Writ of Certiorari.

II.

ANY FEDERAL QUESTIONS RAISED IN THE COLLINS' PETITION FOR WRIT OF CERTIORARI WERE NOT "PRESSED OR PASSED UPON" BY THE PENNSYLVANIA COURTS, AND THEREFORE, THE UNITED STATES SUPREME COURT SHOULD NOT, FOR BOTH JURISDICTIONAL AND PRUDENTIAL REASONS, GRANT CERTIORARI.

This Court has been frequently called upon to interpret its jurisdiction under 28 U.S.C. § 1257, which was derived from § 25 of the Judiciary Act of 1789, and its predecessors, and has held that it does not have jurisdiction unless a federal question has been raised and decided in the state court below. *Crowell v. Randell,* 35

U.S. (10 Pet.) 368 (1836). "If both of these do not appear on the record, the appellate jurisdiction fails." *Id.* at 392.[2] This rule, which became known as the "not pressed or passed upon below" rule, was expounded upon in *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35 (1940), in which this Court observed:

> [I]t is also the settled practice of this court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the Federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below . . . . In cases coming here from state courts in which a state statute is assailed as unconstitutional, there are reasons of peculiar force which should lead us to refrain from deciding questions not presented or decided in the highest court of the state whose judicial action we are called upon to review. Apart from the reluctance with which every court should proceed to set aside legislation as unconstitutional on grounds not properly presented, due regard for the appropriate relationship of this court to state courts requires us to decline to consider and decide questions affecting the validity of state statutes not urged or considered there. It is for these

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2. Although the rule of *Crowell v. Randell* literally required that the federal claim be *both* raised and addressed in state court, later decisions have required only that the federal claim be *either* raised or considered and resolved by the state court. *Illinois v. Gates*, 462 U.S. 213, 218, n. 1 (1983), *citing*, *McGoldrick v. Compagnie Generale Transatlantique*, 309 U.S. 430, 434-35(1940).

> reasons that this Court, where the constitutionality of a statute has been upheld in the state court, consistently refuses to consider any grounds of attack not raised or decided in that court.

(Citations omitted). *See also, State Farm Mut. Auto. Ins. Co. v. Duel,* 324 U.S. 154, 160 (1944). In *Cardinale v. Louisiana,* 394 U.S. 437, 438 (1969), this Court explained the rationale underpinning this rule:

> Questions not raised below are those on which the record is very likely to be inadequate, since it certainly was not compiled with those questions in mind. And in a federal system it is important that state courts be given the first opportunity to consider the applicability of state statutes in light of constitutional challenge, since the statutes may be construed in a way which saves their constitutionality. Or the issue may be blocked by an adequate state ground. Even though States are not free to avoid constitutional issues on inadequate state grounds, . . . they should be given the first opportunity to consider them.

Id. at 439 (citation omitted).

The "not pressed or passed upon below" rule has been frequently and consistently applied by this Court to preclude review of proffered constitutional issues that the litigants have failed to properly preserve in the state courts. *See Monks v. New Jersey,* 398 U.S. 71 (1970); *Hill v. California,* 401 U.S. 797, 805-06 (1971); *Tacon v. Arizona,* 410 U.S. 351, 352 (1973); *Fuller v. Oregon,* 417 U.S. 40, 50, n. 11 (1974); *Webb v. Webb,* 451 U.S. 493,

495 (1981); *Illinois v. Gates*, 462 U.S. 213, 222 (1983); and *Bankers Life & Casualty Co. v. Crenshaw*, 486 U.S. 71, 76 (1988). *But see, Terminiello v. Chicago*, 337 U.S. 1, 8 (1949) (Frankfurter, J., dissenting) ("For the first time in the course of the 130 years in which State prosecutions have come here for review, this Court is today reversing a sentence imposed by a State court on a ground that was urged neither here nor below. . . ."); *Vachon v. New Hampshire*, 414 U.S. 478, 483-84 (1974) (Rehnquist, J., dissenting) ("Since the Supreme Court of New Hampshire was not presented with a federal constitutional challenge to the sufficiency of the [challenged] evidence, resolution of this question by the Court is inconsistent with the Congressional limitation on our jurisdiction to review the final judgment of the highest court of a State").

This Court has stated that there are various ways in which the validity of a state statute may be drawn in question on the ground that it is repugnant to the Constitution of the United States. "Although no particular form of words or phrases is essential, the claim of invalidity and the ground therefore must be brought to the attention of the state court with fair precision and in due time." *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928). The Collins simply did not bring any federal issue "to the attention of the state court with fair precision and in due time." A review of the statement of issues and summaries of argument of the briefs filed by the Collins in the Pennsylvania courts shows they presented no federal constitutional questions at any stage of the state court proceedings. *See* Appendix attached hereto which contains the pertinent sections of the Collins' brief in the Pennsylvania Superior Court (1a-8a)[3]; Petition for Allowance of Appeal to the Pennsylvania Supreme Court (9a-20a); and brief in the Pennsylvania Supreme Court (21a-28a). In the text of their briefs,

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3. References to the Appendix to the Hospital's Brief in Opposition are designated as "(__a)."

the only reference to the federal principle of due process is made, in passing, in their brief before the Pennsylvania Supreme Court, in which they baldly conclude that "it was simply unfair and, thus, a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction." (27a) (citations omitted). This passing reference to "due process" is insufficient, for several reasons, to constitute a proper and timely presentation of this issue to the Pennsylvania courts.

The proper method for raising a federal question is dependent upon the particular state practice. *See Pennsylvania R.R. Co. v. Illinois Brick Co.*, 297 U.S. 447 (1936). Rule 1115(a)(3) of the Pennsylvania Rules of Appellate Procedure governs the content of a Petition for Allowance of Appeal to the Pennsylvania Supreme Court and provides in pertinent part that "[o]nly the questions set forth in the petition, or fairly comprised therein, will ordinarily be considered by the court in the event that an appeal is allowed." The sole issue presented by the Collins' Petition for Allowance of Appeal to the Pennsylvania Supreme Court was:

> Where state pendent claims are transferred from federal court to a Pennsylvania state court pursuant to 42 Pa. C.S.A. sec. 5103, may the lower courts construe the statute as requiring "promptness" and in so doing shall the transfer be stricken for untimeliness when the transfer is accomplished within seven months when the term 'prompt' is neither contained in the statute nor the time within which the transfer must be accomplished under such term is defined or provided by those courts.

(12a-13a). Thus phrased, this issue simply does not implicate the

Due Process Clause of the Fourteenth Amendment to the United States Constitution.

Furthermore, Pa. R. App. P. 2216, which sets forth the requirements of the contents of a brief before the Pennsylvania Supreme Court, provides in relevant part that "no point will be considered [by the Pennsylvania Supreme Court] which is not set forth in the statement of questions involved or suggested thereby." The issues presented in the Collins' Brief in the Pennsylvania Supreme Court are as follows:

> Whether the timeliness of a transfer of pendant state claims transferred pursuant to § 5103(b) is based on principles of non pros or is based on the word "prompt" as supplied and understood by the Court of Common Pleas and affirmed by the Superior Court as a term used in construing 42 Pa. C.S.A. § 5103?
>
> Below, both the Court of Common Pleas and the Superior Court considered promptness to be a requirement in effecting a transfer pursuant to § 5103. Neither court addressed the question of the propriety of a non-pros petition for attacking delay in effecting a § 5103 transfer.

(23a). Again, these statements simply do not implicate federal due process issues.

The Collins' passing reference to "due process" in the body of their brief is similarly insufficient to preserve any federal constitutional issue for review by this Court. In *Webb v. Webb*, 451 U.S. at 501, this Court stated that:

> [a]t the minimum, . . . there should be no doubt from the record that a claim under *a federal* statute or the *Federal* Constitution was presented in the state courts and that those courts were apprised of the nature or substance of the federal claim at the time and in the manner required by the state law.

The *Webb* Court determined that "[a]lthough petitioner did use the phrase 'full faith and credit' at several points in the proceedings below, nowhere did she cite to the Federal Constitution or any cases relying on the Full Faith and Credit Clause of the Federal Constitution." *Id.* at 496. Because the petitioner failed to raise her federal claim in the state proceedings and the Georgia Supreme Court thus failed to rule on any federal issue, the court concluded that it was without jurisdiction in the case and dismissed the writ for want of jurisdiction. *Id.* at 501-02. *See also, Bowe v. Scott*, 233 U.S. 658, 664-65 (1914) (reference to "due process of law" "affords no basis whatever for invoking the jurisdiction of this court"). Thus, the words "due process," without more, are inadequate to preserve any federal constitutional issue for review by this Court.

Moreover, the Collins have simply failed to meet their burden to establish that this Court has jurisdiction. It is the *petitioner* who bears the burden of establishing the Supreme Court's jurisdiction. *Durley v. Mayo*, 351 U.S. 277, 285 (1956). This Court's Rule 14(h) mandates in pertinent part:

> If review of a judgment of a state court is sought, the statement of the case shall also specify the stage in the proceedings, both in the court of first instance and in the appellate courts, at which the federal questions sought to be reviewed were raised; the method or manner

> of raising them and the way in which they were passed upon by those courts; and such pertinent quotation of specific portions of the record or summary thereof, with specific reference to the places in the record where the matter appears (*e.g.*, ruling on exception, portion of court's charge and exception thereto, assignment of errors) as will show that the federal question was timely and properly raised so as to give this Court jurisdiction to review the judgment on a writ of certiorari.

Sup. Ct. R. 14(h). In their Petition, the Collins do little more than summarily contend that the constitutional issues have been raised, preserved and ruled upon by the Pennsylvania courts. *See* Petition at 2-3. However, the Collins do not indicate, either in the text of their Petition or by citation to the record, the stage of the proceedings at which their constitutional claims were raised, the method by which these claims were raised, or the way in which they were passed upon by the courts below.[4] The Petition thus does not comply with the requirements of Rule 14(h) and Petitioners have failed to meet their burden of establishing this Court's jurisdiction.

In sum, under the rule of *Crowell v. Randell* and its progeny, this Court, for both jurisdictional and prudential reasons, should decline to consider the federal questions presented in the Collins' Petition for Writ of Certiorari as they were not "pressed or passed upon" by the Pennsylvania courts.

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4. It is noteworthy that none of the Pennsylvania courts' opinions refer to any constitutional claim or argument. (*See* A.1-26) When "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969).

III.

THE DECISIONS OF THE PENNSYLVANIA SUPERIOR AND SUPREME COURTS WERE PROPER AND DO NOT JUSTIFY REVIEW BY THE UNITED STATES SUPREME COURT.

Petitioners argue that this case "cries out for justice" because the Pennsylvania Superior and Supreme Courts did not agree with their interpretation of §§ 5103 and 5535 of Title 42 of Pennsylvania's Consolidated Statutes Annotated. Petition at 15. The Collins argue that reading these two sections together inexorably leads to the conclusion that they had one year to transfer their action from federal to state court. However, the plain language of §§ 5103 and 5535 indicates that the two provisions are independent of each other and apply to distinctly different situations. Title 42 Pa. Cons. Stat. Ann. § 5535, by its express terms, applies to the *commencement* of a *new action* following the termination of a prior *matter* based on the same *cause of action,* whereas 42 Pa. Cons. Stat. Ann. § 5103 applies only to the *transfer of matters* filed in the wrong court. Section 5103(b) is even narrower in its scope, applying only to actions dismissed from federal court for lack of subject matter jurisdiction. As will be shown, *infra,* the specific terms utilized in each section are significant when analyzing the application of the respective provisions.

Section 5535 provides in pertinent part:

> § 5535 *Effect of other actions and proceedings*
>
> (a) Termination of prior matter. —
>
> (1) If a civil action or proceeding is timely commenced and is terminated, a party, or his

> successor in interest, may, notwithstanding any other provision of this subchapter, commence a *new action* or *proceeding* upon the same *cause of action* within one year after the termination and any other party may interpose any defense or claim which might have been interposed in the original action or proceeding.
>
> (2) Paragraph (1) does not apply to:
>
> (i) An action to recover damages for injury to the person or for the death of an individual caused by the wrongful act or neglect or unlawful violence or negligence of another.
>
> (ii) An action or proceeding terminated by a voluntary non-suit, a discontinuance, a dismissal for neglect to prosecute the action or proceeding, or a final judgment upon the merits.

42 Pa. Cons. Stat. Ann. § 5535(a) (emphasis added). This provision permits a litigant one year to *commence a new action* if the original proceeding on the same cause of action is terminated, so long as the initial action is not a personal injury action, terminated by voluntary non-suit, dismissed for failure to prosecute or decided on the merits.

Each of the essential terms of the statute — "matter," "action" and "cause of action" — have distinct meanings which are important to the interpretation of this section and its comparison to § 5103(b). A "matter" is defined in 42 Pa. Cons. Stat. Ann. § 102 as an "action, proceeding or appeal." An "action" is defined by the same section as "any action at law or in equity." Thus, the

definitional section of Title 42 makes clear that the terms "action" and "matter" refer to a legal proceeding or lawsuit pending before a court. On the other hand, the term "cause of action" is defined in *Black's Law Dictionary* as "the fact or facts which give a person a right to judicial relief," as distinct from a theory of recovery or legal action upon which relief is sought. Section 5535, therefore, contemplates the commencement of a new legal proceeding based upon the same cause of action, but not necessarily the same legal theory or claim for relief.

For instance, § 5535 applies where a party has timely filed an action but has failed to meet the technical pleading requirements of the chosen theory of recovery. Where, after dismissal at the pleadings stage and upon further investigation, the plaintiff discovers facts which support recovery on the same cause of action (the facts giving rise to the claim), but under a different legal theory of recovery, § 5535 allows one year to file a new action on the same cause of action. The prohibition of § 5535(a)(2)(ii) against refiling actions that have been voluntarily non-suited, discontinued or determined on the merits leaves only the dismissal for "technical" failures at the pleadings stage; *e.g.*, improper service, failure to include a necessary party and the other grounds set forth in Pa. R. Civ. P. 1028 for Preliminary Objections. Because dismissal on these grounds is not "a determination on the merits," § 5535 gives a plaintiff additional time to investigate her claim and cure the defects that led to the dismissal of her first effort. The rationale behind this provision is apparent. If a plaintiff has timely filed her claim, the defendant is on notice of the lawsuit and the facts upon which it is based. Allowing an additional year to cure any defects in the original complaint does not seriously disadvantage or inconvenience the defendant because the dismissal will necessarily have come at the initial stages of the lawsuit. On the other hand, if the plaintiff has a valid cause of action, dismissal without recourse should additional necessary evidence come to light within one year would be unreasonably harsh.

Section 5103, by contrast, governs only the *transfer of matters* which have been erroneously filed in the wrong court. That section provides:

> § 5103 *Transfer of erroneously filed matters*
>
> (a) General rule. — If an appeal or other matter is taken to or brought in a court or magisterial district of this Commonwealth which does not have jurisdiction of the appeal or other matter, the court or district justice shall not quash such appeal or dismiss the matter, but shall transfer the record thereof to the proper tribunal of this Commonwealth, where the appeal or other matter shall be treated as if originally filed in the transferee tribunal on the date when the appeal or other matter was first filed in a court or magisterial district of this Commonwealth. A matter which is within the exclusive jurisdiction of a court or district justice of this Commonwealth but which is commenced in any other tribunal of this Commonwealth shall be transferred by the other tribunal to the proper court or magisterial district of this Commonwealth where it shall be treated as if originally filed in the transferee court or magisterial district of this Commonwealth on the date when first filed in the other tribunal.
>
> (b) Federal cases. —
>
> (1) Subsection (a) shall also apply to any *matter* transferred or remanded by any United States court for a district

embracing any part of this Commonwealth. In order to preserve a claim under Chapter 55 (relating to limitations of time), a litigant who timely commences an *action* or *proceeding* in any United States court for a district embracing any part of this Commonwealth is not required to commence a protective action in a court or before a district justice of this Commonwealth. Where a *matter is* filed in any United States court for a district embracing any part of this Commonwealth and the *matter* is dismissed by the United States court for lack of jurisdiction, any litigant in the *matter* filed may transfer the *matter* to a court or magisterial district of this Commonwealth by complying with the transfer provisions set forth in paragraph (2).

(2) Except as otherwise prescribed by general rules, or by order of the United States court, such transfer may be effected by filing a certified transcript of the final judgment of the United States court and the related pleadings in a court or magisterial district of this Commonwealth. *The pleadings shall have the same effect as under the practice in the United States court,* but the transferee court or district justice may require that they be amended to conform to the practice in

> this Commonwealth. Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection.

42 Pa. Cons. Stat. Ann. § 5103 (emphasis added).

Section 5103(b) permits a litigant to transfer a *matter* that has been dismissed by a federal court for lack of subject matter jurisdiction to the appropriate state court. Nowhere does § 5103(a) or § 5103(b) speak of filing a new matter based on the same cause of action, and it is clear from the language of § 5103(b)(2) that the original pleadings in federal court define the scope of the action once transferred. In other words, a plaintiff could not transfer an action after the expiration of the statute of limitations and then attempt to amend his complaint to add new theories of recovery not plead in the original federal complaint. Section 5103 is intended only to place the action in the right forum and to protect a plaintiff from the bar of the statute of limitations if the original action was timely filed, albeit in the wrong court. It does not allow the plaintiff to file a new action with claims and theories of recovery different from those set forth in the complaint. Furthermore, unlike § 5535 where the action is dismissed at the pleading stage, actions transferred pursuant to § 5103(b) can be dismissed from federal court at any stage of the proceedings once the court determines it lacks subject matter jurisdiction, which it can do, sua sponte, at any time. Fed. R. Civ. P. 12(h)(3). In this case, for instance, the dismissal came more than two years after the initial filing.

The language of § 5535 and § 5103 with respect to how the action is reinstated is also significant. Section 5535 speaks of the *commencement* of a new action, whereas § 5103(b) refers to the *transfer* of an existing action. Nowhere in the language of § 5535 does the word "transfer" appear. Rather, the words "termination,"

"terminate" and "commence" appear repeatedly throughout the statute. *See* 42 Pa. Cons. Stat. Ann. § 5535(b)-(c). The phrase "commencement of a new action" describes the initiation of a new proceeding by the filing and service of initial process. Section 5103, however, is entitled "Transfer of erroneously filed matters" and pertains to the transfer of cases without the necessity of service of original process. Therefore, the two provisions pertain to two very different situations.

Furthermore, the time period contained in § 5535 has a clear purpose. The one-year period provides a litigant sufficient time to further investigate her cause of action and then refile or recommence a new action with the benefit of any additional evidence. By contrast, the transfer of an action under § 5103 requires no investigation or even the preparation of new pleadings. This omission of an express time limitation for effecting a transfer pursuant to § 5103 is explained by the fact that up until the 1982 amendments to that section, it was contemplated that the action necessary to transfer the matter would be taken by the court, not the litigants, thus negating the need for any time limitation. The timing of the enactment of the amendments to §§ 5103(b) and 5535 makes it unlikely that the Legislature intended to include transfers under § 5103 within the savings provisions of § 5535. Furthermore, practical considerations make it even less likely. Why would the Legislature provide a litigant one year to transfer the claims under § 5103(b), when all the Legislature requires the litigant do is obtain and file certified copies of the federal docket and pleadings? It is inconceivable that the Legislature could have expected that such a task would require up to one year to complete.

The legislative history of §§ 5103 and 5535, particularly the dates of enactment and amendment of the provisions, further supports the conclusion that these provisions are independent and apply to distinctly different situations. Section 5535 was introduced as P.L. 586, No. 142, § 2 on July 9, 1976 and became

effective on June 27, 1978. Although Pennsylvania has had a statute governing the transfer of actions erroneously filed in the wrong court since 1933, the modification to § 5103(b) that required the litigants, not the federal court, to transfer claims to state court was made in 1982. Section 5103(b) was amended by the Act of December 20, 1982, P.L. 1409, No. 326, Art. II, § 201, effective February 18, 1983, seemingly in response to Judge Sloviter's *dubitante* opinion in *Weaver v. Marine Bank,* 683 F.2d 744 (3d Cir. 1982), in which she questioned a federal district court's power to transfer pendent state law claims on the basis of a state statute. The 1982 amendment to § 5103(b) made two significant changes. First, it referred to cases "dismissed" by a federal court, and second, it spoke in terms of the "litigants," rather than the court, taking the steps necessary to transfer the claim. 42 Pa. Cons. Stat. Ann. § 5103(b) (1982). In sum, with the 1982 amendment, § 5103(b) now spoke of the federal court *dismissing* pendent claims and the *litigant* transferring the claims *after their dismissal.* With these changes, the need for a time period during which the litigant must act arose for the first time.

Therefore, because § 5535 was enacted approximately five years before the amendment to § 5103(b) which created the need for a time limit under which a transfer must be effected, the Legislature could not have intended at the time § 5535 was enacted that the one-year period provided therein would apply to the transfer of claims under § 5103(b). Further, had the Legislature intended that § 5535's one-year provision apply to the newly modified version of § 5103(b), it surely would have amended § 5535 in 1982 to so indicate.

The Legislature would have also cross-referenced the general time provision of § 5535 if it intended that clause to apply to the transfer of claims under § 5103(b), rather than making reference only to the exclusion set forth in § 5535(a)(2)(i). The argument that, by negative implication, § 5103(b)(2) renders the one-year

limitation period of § 5535 applicable to all claims transferred pursuant to § 5103(b)(1)-(2) is overly simplistic. The reference in § 5103(b)(2) is as follows: "Section 5535(a)(2)(i) (relating to termination of prior matter) shall not be applicable to a matter transferred under this subsection." 42 Pa. Cons. Stat. Ann. § 5103(b)(2). This provision simply makes clear that, notwithstanding the prohibition against filing a *new* personal injury action, personal injury claims may be *transferred* to state court pursuant to § 5103(b) following their dismissal from federal court for lack of subject matter jurisdiction. In light of the absolutely minimum action required to transfer the matter, allowing one year to accomplish it would be highly incongruous.

In sum, both the plain language and legislative history of 42 Pa. Cons. Stat. Ann. §§ 5535 and 5103(b) make clear that the two provisions are independent of each other and apply to distinctly different situations, and the Pennsylvania state courts were correct in rejecting Petitioners' argument that they had one year to transfer their claims to state court upon their dismissal from federal court for lack of subject matter jurisdiction.

CONCLUSION

Respondent Greene County Memorial Hospital respectfully urges this Honorable Court to deny the Petition for Writ of Certiorari filed by Petitioners Jean and Terry Collins.

Respectfully submitted,

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APPENDIX A — APPELLANTS' BRIEF IN THE SUPERIOR COURT OF PENNSYLVANIA, WESTERN DIVISION

IN THE SUPERIOR COURT OF PENNSYLVANIA
WESTERN DIVISION

NO: 01251 PGH 91

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Appellants,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Appellees.

APPELLANTS' BRIEF

Appeal from an Order dated June 7, 1991 at
A.D. 186 of 1991 in the Court of Common Pleas
of Greene County, Pennsylvania, Civil Division

Louis M. Tarasi, Jr., Esquire
Joseph J. Hinchliffe, Esquire

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Attorneys for Appellants

* * *

Appendix A

STATEMENT OF JURISDICTION

This matter is on appeal from a final order of the Greene County Court of Common Pleas. Accordingly, this Honorable Court has jurisdiction pursuant to 42 Pa. Cons. Stat. Ann. 702 (Purdon's 1990).

ORDER IN QUESTION

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

STATEMENT OF THE QUESTION INVOLVED

WHETHER THE TIMELINESS OF A TRANSFER OF PENDANT STATE CLAIMS TRANSFERRED PURSUANT TO § 5103(b) IS BASED ON PRINCIPLES OF NON PROS OR AS A MATTER OF STATUTORY CONSTRUCTION AS BASED ON THE WORD "PROMPT" AS SUPPLIED AND UNDERSTOOD BY THE TRIAL COURT AS A TERM USED IN CONSTRUING 42 PA. C.S.A. § 5103.

STATEMENT OF THE CASE

On or about October 8, 1986, Plaintiff, Jean Collins, was sexually assaulted by Defendant, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Plaintiffs, Jean and Terry

Appendix A

Collins, timely filed this action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Defendants under Title VII of the Civil Rights Act of 1964, 421 U.S.C., § 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress.

On August 8, 1990, Plaintiffs accepted the Defendant hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Plaintiffs' Title VII claim against the Defendant hospital. On August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Plaintiffs' Title VII claim and, on August 23, 1990 the Court entered a Memorandum Order dismissing Plaintiffs' remaining state law claims for lack of subject matter jurisdiction.

On March 19, 1991, Plaintiffs filed a Praecipe to Transfer Plaintiffs' state claims in the Court of Common Pleas of Greene County, pursuant to 42 Pa. C.S.A. § 5103(b). Thereafter, both the Defendant doctor and the Defendant hospital filed Preliminary Objections or, in the alternative, Motions for Summary Judgment in response to Plaintiffs' Praecipe to Transfer — the basis of both Defendants' objections being that the seven month delay in filing a Praecipe to Transfer rendered the said transfer of the Plaintiffs' claims untimely thereby depriving the court of jurisdiction.

On June 7, 1991, the Honorable H. Terry Grimes sustained the Defendants' Preliminary Objections on the ground that the Plaintiffs did not promptly file a Praecipe to Transfer as, according to the Court, is required by 42 Pa. C.S.A. § 5103(b).

Appendix A

SUMMARY OF THE ARGUMENT

By enacting 42 Pa. C.S.A. § 5103 the legislature recognized the practical effect of filing state claims in federal court was to substantially fulfill the purpose of the applicable statute of limitations, i.e. to put an individual on notice within a reasonable amount of time that claims are being made against him. The recognition by the legislature of the practical effect of timely filing state claims in federal court rightly elevates substance over form, by keeping viable claims dismissed from federal court which, a the time of dismissal, have become technically time barred under state law. Simply put, under § 5103 the legislature intended that an action is commenced for purposes of state law and the statute of limitations is tolled at the time a party files state claims in federal court. Accordingly, a litigant's transfer of federally dismissed claims to state court is merely a ministerial act.

The clear and unambiguous language of § 5103 determines the conclusions that an action is commenced and the statute of limitations effectively tolled once a party timely files state claims in federal court, and that a subsequent transfer of such claims pursuant to § 5103 is a ministerial act.

First, § 5103(b)(1) specifically provides that a litigant need not file a protective action in state court when he timely files state claims in federal court. Thus, for purposes of state law an action is commenced and the statute of limitations tolled at the time of filing in federal court regardless of whether the action is subsequently dismissed from federal court.

Secondly, § 5103 provides the procedural rationale for why dismissal from federal court *does not* affect a claim's status as commenced. Under § 5103(a) a state court must treat the

transferred claim as if originally filed on the date when the claim was first filed in federal court. Thus a trial court, under § 5103 has no discretion in determining if the statute of limitations bars plaintiff's transfer to state court claims timely filed but dismissed from federal court. Rather the court must treat the claim as if it were filed in state court on the date filed in federal court.

Third, once a claim is dismissed from federal court § 5103 provides that *any* litigant in the case may effect a transfer under § 5103. Where timeliness is a legislative requirement, remedies and/or substantive rights are affected, precisely because a specific party is charged with a particular requirement which includes the filing of an action within a particular time period. Subsection (b)(1) however, by unambiguously asserting that *any litigant* may effect the transfer recognizes, for the purposes of the statute, that the dismissal from federal court *has no effect on the status of the claim as being commenced;* thus no particular party is burdened with "recommencing" the action because the act of effecting a transfer is merely ministerial.

Lastly, and most importantly for purposes of this action, the ministerial nature of effecting a transfer pursuant to § 5103, is certainly provided by the conspicuous absence of a time requirement within which to effect a transfer under § 5103. Certainly it is an understatement to say that the legislature had the notion of timeliness in mind when drafting § 5103. However, by not imposing a time requirement and requiring only that any litigant effect a transfer by filing certified copies of the *federal pleadings,* the legislature fully intended the act of transfer under § 5103 to be ministerial. Had the legislature intended otherwise a time requirement certainly would have been included within § 5103.

Because a claim, technically time barred solely because of the date dismissed from federal court for lack of jurisdiction, remains commenced under the protection afforded by § 5103, the only means for a defendant to attack what he may consider inordinate delay in a plaintiff's transfer of his action to state court under § 5103, is a Petition for Non Pros. Non Pros is an equitable action afforded to a defendant when a Plaintiff fails to prosecute his action. However, delay itself is insufficient for a granting of Non Pros. The defendant, under the doctrine must also show that he has been prejudiced by a plaintiff's delay in prosecuting his action.

That Non Pros is the only means of attacking delay under § 5103 is compelled by the procedural effect of filing a certified copy of the pleadings in state court under § 5103: Once a litigant has effected a transfer by filing a certified copy of the proceedings in state court, the court *must treat* the matter "as if originally filed in the transferee tribunal on the date when the claim was filed in federal court."

In the case at bar, the defendants in this case have in no way been prejudiced by the plaintiffs' proper transfer of this case on March 19, 1990 pursuant to § 5103. Thus any Petition for Non Pros is certainly premature and has no merit.

Seizing upon dicta in the case of *Williams v. Smithe* — that in order to protect the timeliness of an action under § 5103 a litigant must promptly effect a transfer pursuant to § 5103 — Defendant contends that as a matter of law Plaintiffs' claim is time barred because not promptly transferred from federal to state court. However, as any review of *Williams* indicates the Defendant's position is simply untenable.

First, as dicta, the language in *Williams* is not law, it merely

reflects what this court perceives should occur in the prosecution of *any* claim.

Second, *Williams* specifically held that complying with the provisions of § 5103 seven months after dismissal from federal court did not render Plaintiffs' claim untimely despite the fact that the Plaintiffs' timely claim in federal court was technically time barred in state court. In the case at bar Plaintiffs also effected her transfer under § 5103 seven months after the dismissal. Certainly *Williams* is controlling and Plaintiffs' claim is not untimely on a matter of law.

Lastly the dicta in *Williams* provides no basis upon which to attack the timeliness of a transfer under § 5103. Did the court intend that the statute of limitations applies when a plaintiff fails to promptly affect a transfer, or did the court intend a "new" limitation requirement based on the uncertainty of the term "promptness", or did the court intend to raise the specter of the availability of a Non Pros petition should a plaintiff delay in effecting a transfer?

Given the protection afforded a plaintiff under § 5103, Plaintiffs submit that applying either of the first of these alternatives can only be done in contravention of the holding in *Williams* and in contravention of the clear and unambiguous language of § 5103 that: (1) a plaintiff need not file a protective action when filing state claims in federal court; (2) that the state court must treat the transferred claims as if filed on the date filed in federal court; and (3) that any litigant in the matter may effect a transfer (application of either of the first two alternatives places, de facto, the sole burden on the plaintiff to transfer his action under the statute).

Given *Williams* and the clear and unambiguous language of § 5103, the only means available to a defendant to attack delay in effecting a transfer is a Petition for Non Pros since the status of a claim dismissed from federal court remains commenced under § 5103.

Lastly, on the hearing of defendant's Preliminary Objections the trial court, without reference to any case law, held Plaintiffs' claim untimely as a matter of statutory construction. In reaching its holding the court, in error, assumed that § 5103 expressly requires that a plaintiff promptly transfer his action. In short, the court believed that the word prompt is literally used in the statute. However, any reading of § 5103 demonstrates the court's error because "prompt" is simply not found in the statute, nor can any such requirement be reasonably implied from the language.

It is a fundamental precept of statutory construction that a court cannot insert a word into a statute where the legislature has failed to supply it. *Worley v. Augustine,* 310 Pa. Super. 178, 456 A.2d 558, 561 (1983). This limitation applies both where it appears that the word or provision was intentionally omitted, and where the omission is the result of inadvertence or a failure of the legislature to foresee or contemplate the case in question. *Latella v. Unemployment Compensation Board of Review,* 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983).

Given the trial court's error, together with the clear and unambiguous language of § 5103, Plaintiffs' claim was not untimely when transferred to state court on March 19, 1991. Moreover, for the reasons stated the proper basis for attacking delay when transferring an action pursuant to § 5103 is by a Non Pros petition.

APPENDIX B — PETITION FOR ALLOWANCE OF APPEAL IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DIVISION

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DIVISION

NO: 645 W.D. Alloc. 1992

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL

Petition for Allowance of Appeal from the Order of the Superior Court of Pennsylvania at No. 1251 Pittsburgh 1991, Entered on November 2, 1992, Affirming the Order of the Court of Common Pleas of Greene County, Pennsylvania, Civil Division, at A.D. No. 186 of 1991, Dated June 7th, 1991, Sustaining Preliminary Objections of Defendants and Striking the Transfer of the Action From Federal Court.

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* * *

Appendix B

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DIVISION

NO:

JEAN COLLINS, an individual; and
TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and ARUNAVA DAS, M.D.,

Respondents.

PETITION FOR ALLOWANCE OF APPEAL

The Petition of Jean Collins and Terry Collins respectfully prays your Honorable Court to grant an allowance of this Appeal and respectfully submit the following:

I. REFERENCE TO THE OPINIONS BELOW.

The Opinion of The Superior Court of Pennsylvania has not yet been reported; the Opinion of the Court of Common Pleas of Greene County is also unreported. Copies of both Opinions are attached hereto in the Appendices as required by Pa.R.A.P. 1115(1)(6).

II. TEXTS OF THE ORDERS IN QUESTIONS.

A. The Order in question entered in the Superior Court dated

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November 2, 1992, before Judges Del Sole, Johnson and Ford Elliott, provides as follows:

JEAN COLLINS, AN INDIVIDUAL
AND TERRY COLLINS, HER
HUSBAND

APPELLANTS

NO. 1251 PITTSBURGH 1991

V

GREENE COUNTY MEMORIAL
HOSPITAL, A CORPORATION
AND ARUNAVA DAS, MD

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of GREENE County be, and the same is hereby AFFIRMED. JUDGE JOHNSON FILES A DISSENTING OPINION.

BY THE COURT:

/s/ Eleanor R. Valecho
DEPUTY PROTHONOTARY

DATED: NOVEMBER 2, 1992

B. The Order in the Court of Common Pleas of Greene County, Pennsylvania, Civil Division, dated June 7, 1989, before H. Terry Grimes, President Judge, provides as follows:

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JEAN COLLINS, an individual;
and TERRY COLLINS, her husband,

Plaintiffs,

vs. A.D. No. 186 of 1991

GREENE COUNTY MEMORIAL
HOSPITAL, a corporation; and
ARUNAVA DAS, M.D.,

Defendants.

ORDER

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

III. QUESTION PRESENTED FOR REVIEW.

WHERE STATE PENDENT CLAIMS ARE TRANSFERRED FROM FEDERAL COURT TO A PENNSYLVANIA STATE COURT PURSUANT TO 42 Pa.C.S.A. SEC. 5103, MAY THE LOWER COURTS CONSTRUE THE STATUTE AS REQUIRING "PROMPTNESS" AND IN SO DOING SHALL THE TRANSFER BE STRICKEN FOR UNTIMELINESS WHEN THE TRANSFER IS

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ACCOMPLISHED WITHIN SEVEN MONTHS WHEN THE TERM "PROMPT" IS NEITHER CONTAINED IN THE STATUTE NOR THE TIME WITHIN WHICH THE TRANSFER MUST BE ACCOMPLISHED UNDER SUCH TERM IS DEFINED OR PROVIDED BY THOSE COURTS.

IV. STATEMENT OF THE CASE

On or about October 8, 1986, Plaintiff, Jean Collins, was allegedly sexually assaulted by Defendant, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Plaintiffs, Jean and Terry Collins, timely filed this action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Defendants under Title VII of the Civil Rights Act of 1964, 421 U.S.C., Sec. 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress.

On August 8, 1990, Plaintiffs accepted the Defendant Hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Plaintiffs' Title VII claim against the Defendant Hospital. On August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Plaintiffs' Title VII claim and, on August 23, 1990 the Court entered a Memorandum Order dismissing Plaintiffs' remaining state law claims for lack of subject matter jurisdiction. A copy of Judge Diamond's Order is attached hereto in the Appendices.

On March 19, 1991, Plaintiffs filed a Praecipe to Transfer Plaintiffs' state claims in the Court of Common Pleas of Greene County, pursuant to 42 Pa. C.S.A. Sec. 5103(b), a copy of which statute is attached hereto in the Appendices. Thereafter, both the Defendant doctor and the Defendant hospital filed Preliminary

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Objections or, in the alternative, Motions for Summary Judgment in response to Plaintiffs' Praecipe to Transfer — the basis of both Defendants' objections being that the seven month delay in filing a Praecipe to Transfer rendered the said transfer of the Plaintiffs' claims untimely, thereby depriving the court of jurisdiction.

By an Order dated June 7, 1991, the Honorable H. Terry Grimes sustained the Defendants' Preliminary Objections on the ground that the Plaintiffs' filing was not "prompt" as mandated by the transfer statute which was required as a matter of statutory construction.

Thereafter, Petitioners filed their Notice of Appeal to Judge Grimes' Opinion on June 6, 1991, to the Superior Court of Pennsylvania. After briefing and oral argument before that Court, it rendered its Decision and Order of November 2, 1992, in which it sustained the Order of the Lower Court, thus affirming the holding that 42 Pa.C.S.A. Sec. 5103(b) transfers must be "prompt", although the statute provides no such requirement, nor any time requirement at all, and that the nearly seven month period before the filing was not timely, and therefore, the transfer was stricken and Petitioners thus lost their rights to proceed in any Court to litigate their state causes of action.

Although the Lower Court made no reference to the case of *Williams v. F.L. Smithe Machine Company, Inc.*, 395 Pa.Super. 511, 577 A.2d 907 (1990), appeal denied 3/14/91 at 593 A.2d 422 (1991), of this Court, a copy of which is attached hereto in the Appendices, which required the word "prompt" be used in construing the statute, the Superior Court again relied on that case in affirming the Lower Court's decision that a nearly seven month period was not a timely transfer. Thus, the *Williams case, supra,* Petition for Allowance of Appeal was pending in this Honorable Court until five days before Petitioners' transferred the action.

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V. SUMMARY OF THE ARGUMENT

By enacting 42 Pa. C.S.A. Sec. 5103 the legislature recognized the practical effect of filing state claims in federal court was to substantially fulfill the purpose of the applicable statute of limitations, i.e. to put an individual on notice within a reasonable amount of time that claims are being made against him. The recognition by the legislature of the practical effect of timely filing state claims in federal court rightly elevates substance over form, by keeping viable claims dismissed from federal court which, at the time of dismissal, have become technically time barred under state law. Simply put, under Sec. 5103 the legislature intended that an action is commenced for purposes of state law and the statute of limitations is tolled at the time a party files state claims in federal court. Accordingly, a litigant's transfer of federally dismissed claims to state court is merely a ministerial act.

First, Sec. 5103(b)(1) specifically provides that a litigant need not file a protective action in state court when he timely files state claims in federal court. Thus, for purposes of state law an action is commenced and the statute of limitations tolled at the time of filing in federal court regardless of whether the action is subsequently dismissed from federal court.

Secondly, Sec. 5103 provides the procedural rationale for why dismissal from federal court *does not* affect a claim's status as commenced. Under Sec. 5103(a) a state court must treat the transferred claim as if originally filed on the date when the claim was first filed in federal court. Thus a trial court, under Sec. 5103 has no discretion in determining if the statute of limitations bars plaintiff's transfer to state court claims timely filed but dismissed from federal court. Rather the court must treat the claim as if it were filed in state court on the date filed in federal court.

Third, once a claim is dismissed from federal court Sec. 5103 provides that *any litigant* in the case may effect a transfer under Sec. 5103. Where timeliness is a legislative requirement, remedies and/or substantive rights are affected, particularly because a *specific party* is charged with a particular requirement which includes the filing of an action within a particular time period. Subsection (b)(1) however, by unambiguously asserting that *any litigant* may effect the transfer recognizes, for the purposes of the statute, that the dismissal from federal court *has no effect on the status of the claim as being commenced;* thus no particular party is burdened with "recommencing" the action because the act of effecting a transfer is merely ministerial.

Lastly, and most importantly for purposes of this action, the intendment of the ministerial nature of effecting a transfer pursuant to Sec. 5103, is certainly provided by the conspicuous absence of any time requirement within which to effect a transfer under Sec. 5103. By not imposing a time requirement and requiring only that *any litigant* effect a transfer by filing certified copies of the *federal pleadings,* the legislature fully intended the act of transfer under Sec. 5103 to be ministerial. Had the legislature intended otherwise a time requirement certainly would have been included within Sec. 5103.

Because a claim, technically time barred solely because of the date dismissed from federal court for lack of jurisdiction, remains commenced under the protection afforded by Sec. 5103, the only means for a defendant to attack what he may consider inordinate delay in a plaintiff's transfer of his action to state court under Sec. 5103, is a Petition for Non Pros and not a Preliminary Objection. Non Pros is an equitable action afforded to a defendant when a Plaintiff fails to prosecute his action. However, delay itself is insufficient for a granting of Non Pros. The defendant, under the

doctrine must also show that he has been prejudiced by a plaintiff's delay in prosecuting his action. In the case of *Penn Piping, Inc. v. Insurance Company of North America,* 382 Pa. 19, 603 A.2d 1006 (1992), this Honorable Court held, pursuant to its supervisory power over Pennsylvania Courts, that inaction in the case for more than two years *presumptively prejudiced* the defendant, but thus did not discard the prejudice requirement. However, the Superior Court in the case of *Klein v. Walton,* ___ Pa. Super. ___, 604 A.2d 1064 (1992), has perhaps misconstrued the holding of *Penn Piping,* by disregarding the term "presumptively prejudiced' by stating that the case holds that a showing of prejudice is no longer a requirement for dismissing a case on the basis for failure to prosecute. A copy of the *Penn Piping* case report is attached hereto in the Appendices.

That Non Pros is the only means of attacking delay under Sec. 5103 is compelled by the procedural effect of filing a certified copy of the pleadings in state court under Sec. 5103: Once a litigant has effected a transfer by filing a certified copy of the proceedings in state court, the court *must treat* the matter "as if originally filed in the transferee tribunal on the date when the claim was filed in federal court."

In the case at bar, the appellees have not demonstrated that they have been prejudiced by the plaintiffs' proper transfer of this case on March 19, 1991 pursuant to Sec. 5103 approximately seven months after the federal dismissal. Thus any Petition for Non Pros would certainly be premature and has no merit.

Seizing upon the dicta in the *Williams case, supra,* the Superior Court again stated in the present case that in order to protect the timeliness of an action under Sec. 5103 a litigant must "promptly" effect a transfer pursuant to Sec. 5103, and in this case, unlike the *Williams case, supra,* held that a near seven month

period before transfer was not timely and thus the transfer was invalid. Defendant contends that as a matter of law Plaintiffs' claim is time barred because not promptly transferred from federal to state court. However, as a close review of *Williams, supra,* indicates, the Defendant's position is untenable, as a seven month period in that case was held to be timely by the Superior Court.

First, as dicta, the language in *Williams* is not law, it merely reflects what the Superior court perceived should occur in the prosecution of *any* claim.

Second, *Williams, supra,* specifically held that complying with the provisions of Sec. 5103 seven months after dismissal from federal court did not render Plaintiffs' claim untimely despite the fact that the Plaintiffs' timely claim in federal court was technically time barred in state court. In the case at bar Plaintiffs also effected the transfer under Sec. 5103 seven months after the dismissal. Certainly *Williams* is controlling and Plaintiffs' claim is not untimely as a matter of prior controlling law.

Lastly, the dicta in *Williams* provides no basis upon which to attack the timeliness of a transfer under Sec. 5103. Did the Superior Court intend that the statute of limitations applies when a plaintiff fails to promptly affect a transfer, or did the court intend a "new" limitation requirement based on the uncertainty of the term "promptness", or did the court intend to raise the specter of the availability of a Non Pros petition should a plaintiff delay in effecting a transfer?

Given the protection afforded a plaintiff under Sec. 5103, Plaintiffs submit that applying either of the first of these alternatives can only be done in contravention of the holding in *Williams, supra,* and in contravention of the clear and

unambiguous language of Sec. 5103 that: (1) a plaintiff need not file a protective action when filing state claims in federal court; (2) that the state court must treat the transferred claims as if filed on the date filed in federal court; and (3) that *any litigant* in the matter may effect a transfer (application of either of the first two alternatives places, de facto, the sole burden on the plaintiff to transfer his action under the statute).

Given *Williams, supra,* and the clear and unambiguous language of Sec. 5103, the only means available to a defendant to attack delay in effecting a transfer is a Petition for Non Pros since the status of a claim dismissed from federal court remains commenced under Sec. 5103.

Lastly, on the hearing of defendant's Preliminary Objections the trial court, without reference to *Williams, supra,* held Plaintiffs' claim untimely as a matter of *statutory construction.* In reaching its holding the court, in error, assumed that Sec. 5103 expressly requires that a plaintiff "promptly" transfer his action. In short, the court believed that the word "prompt" is literally used in the statute. However, any reading of Sec. 5103 demonstrates the court's error because "prompt" is simply not found in the statute, but only in the Superior Court dicta in *Williams, supra,* nor can any such requirement be reasonably implied with certainty from the language and the context within which it is used.

It is a fundamental precept of statutory construction that a court cannot insert a word into a statute where the legislature has failed to supply it. *Worley v. Augustine*, 310 Pa. Super. 178, 456 A.2d 558, 561 (1983). This limitation applies both where it appears that the word or provision was intentionally omitted, and where the omission is the result of inadvertence or a failure of the legislature to foresee or contemplate the case in question. *Latella v.*

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Unemployment Compensation Board of Review, 74 Pa. Cmwlth. 14, 459 A.2d 464 (1983).

Given the trial court's error, together with the clear and unambiguous language of Sec. 5103, Plaintiffs' claim was not untimely when transferred to state court on March 19, 1991. Moreover, for the reasons stated the proper basis for attacking delay when transferring an action pursuant to Sec. 5103 is by a Non Pros petition.

* * *

APPENDIX C — BRIEF FOR APPELLANTS IN THE SUPREME COURT OF PENNSYLVANIA, WESTERN DISTRICT

SUPREME COURT OF PENNSYLVANIA
Western District

No. 45 W.D. APPEAL DOCKET 93

JEAN COLLINS, an individual;
and TERRY COLLINS, her husband,

Appellants,

v.

GREENE COUNTY MEMORIAL HOSPITAL, a Corporation; and, ARUNAVA DAS, M.D.

Appellees.

BRIEF FOR APPELLANTS

Appeal from the Order of the Superior Court of Pennsylvania at No. 1251 PGH 91 entered 11/2/92 which affirmed the Order of the Court of Common Pleas of Greene County, Civil Division, entered 6/9/91 at No. A.D. 186 of 1991

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Appendix C

* * *

STATEMENT OF JURISDICTION

This matter is on appeal from a final order of the Superior Court of Pennsylvania, Pittsburgh District. Accordingly, this Honorable Court has jurisdiction pursuant to 42 Pa. Cons. Stat. Ann. 724 (Purdon's 1990).

ORDER IN QUESTION

AND NOW, this 7th day of June, 1991, it is ORDERED the preliminary objection of the defendants is sustained and the transfer of the action from Federal Court is stricken.

ATTEST: BY THE COURT:

/s/ Rich Rosendale
PROTHONOTARY

/s/ H. Terry Grimes
PRESIDENT JUDGE

ORDER IN QUESTION

JUDGMENT

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the Court of Common Pleas of GREENE County be, and the same is hereby AFFIRMED. JUDGE JOHNSON FILES A DISSENTING OPINION.

BY THE COURT:

/S/ Eleanor R. Valecko
DEPUTY PROTHONOTARY

DATED: NOVEMBER 2, 1992

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STATEMENT OF THE QUESTION INVOLVED

WHETHER THE TIMELINESS OF A TRANSFER OF PENDANT STATE CLAIMS TRANSFERRED PURSUANT TO § 5103(b) IS BASED ON PRINCIPLES OF NON PROS OR IS BASED ON THE WORD "PROMPT" AS SUPPLIED AND UNDERSTOOD BY THE COURT OF COMMON PLEAS AND AFFIRMED BY THE SUPERIOR COURT AS A TERM USED IN CONSTRUING 42 PA. C.S.A. § 5103?

BELOW, BOTH THE COURT OF COMMON PLEAS AND THE SUPERIOR COURT CONSIDERED PROMPTNESS TO BE A REQUIREMENT IN EFFECTING A TRANSFER PURSUANT TO § 5103. NEITHER COURT ADDRESSED THE QUESTION OF THE PROPRIETY OF A NON-PROS PETITION FOR ATTACKING DELAY IN EFFECTING A § 5103 TRANSFER.

STATEMENT OF THE CASE

On or about October 8, 1986, Appellant, Jean Collins, was sexually assaulted by Appellee, Dr. Das at the Greene County Memorial Hospital. On April 29, 1988, Appellants, Jean and Terry Collins, Jean's husband, timely filed this civil action in the United States District Court for the Western District of Pennsylvania, pleading causes of action against the Appellees under Title VII of the Civil Rights Act of 1964, 421 U.S.C., § 2000(e) (hereinafter "Title VII") and under Pennsylvania Common Law theories of negligence and intentional infliction of emotional distress. (R. at 23a).

On August 8, 1990, Appellants accepted the Appellee Hospital's Offer of Judgment pursuant to F.R.C.P. 68 in regard to Appellants' Title VII claim against the Appellee Hospital. On

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August 17, 1990, the District Court entered an Order of Judgment and Final Decree on Appellants' Title VII claim (R. at 41a) and, on August 23, 1990 the Court entered a Memorandum Order dismissing Appellants' remaining state law claims for lack of subject matter jurisdiction. (R. at 33a, *infra* at 82).

Approximately six and a half months later, on March 19, 1991, Appellants filed a Praecipe to File Certified Copy of Appellants' state claims and a certified copy of the federal pleadings in the Court of Common Pleas of Greene County, pursuant to 42 Pa.C.S.A. § 5103(b). (R. at 2a). Thereafter, both the Appellees filed Preliminary Objections or, in the alternative, Motions for Summary Judgment (R. at 4a, 7a) in response to Appellants' Praecipe to Transfer — the basis of both Appellees' objections being that the delay in filing a Praecipe to Transfer rendered the said transfer of the Appellants' claims untimely, thereby depriving the court of jurisdiction.

By an Order dated June 7, 1991, the Honorable H. Terry Grimes sustained the Appellees' Preliminary Objections on the ground that the Appellants' filing was not "prompt" as required by the "express language" of the transfer statute. (*Infra* at 53). However, the word "prompt" appears nowhere in the statute.

Thereafter, Appellants filed their Notice of Appeal of Judge Grimes' Order of June 7, 1991, to the Superior Court of Pennsylvania on the ground that § 5103 neither explicitly, nor implicitly requires promptness. After briefing and oral argument the Superior Court rendered its Decision and Order of November 2, 1992, in which it sustained the Order of the Court of Common Pleas, thus affirming the holding that 42 Pa.C.S.A. § 5103(b) transfers must be "prompt", although the statute provides no such requirement. (*Infra* at 57). Thereafter, Appellants timely appealed to this Honorable Court.

Appendix C

SUMMARY OF THE ARGUMENT

1. 42 Pa.C.S.A. § 5503 provides the unconditional substantive right of commencing an action, and tolling the statute of limitations, by filing pendant state claims in federal court, regardless of the court (state or federal) in which such claims are ultimately litigated. § 5103 provides the unconditional substantive right of transferring federally dismissed pendant claims to state court. Thus, pursuant to the terms of § 5503, the Legislature intended to provide a shield from the bar of the statute of limitations for state claims filed in federal court which are subsequently dismissed for lack of subject matter jurisdiction.

2. At bar, the Superior Court, apparently unaware of the existence of § 5503, turned that shield into a sword for Appellees when it held that it is § 5103, the transfer statute, which "provides protection from the bar of the statue of limitations," and because Appellants did not effect a § 5103 transfer promptly, the Superior Court affirmed dismissal of Appellant claims.

3. In light of § 5503, the Superior Court incorrectly stated and applied the law. Thus, it is incumbent upon this Court to reverse the dismissal of Appellants state claims.

4. Because Appellants had properly commenced their claims and tolled the statute of limitations by filing in federal court pursuant to § 5503, any complaint Appellees have concerning the time it took to transfer Appellants claims to state court, pursuant to § 5103, should have been addressed in a petition for non-pros. As this Court held in *Lamp v. Heyman*, non-pros is the sole remedy for attacking delay in the absence of a properly enacted or adopted rule to the contrary.

5. Even if this Court considers Appellees preliminary objection as a petition for non-pros, it should be denied because Appellees have at no time argued or shown that they were prejudiced by Appellants' short delay in effecting a § 5103 transfer.

6. The word "prompt" appears nowhere in § 5103 nor can it be reasonably implied. Thus, because it is reversible error for a court to insert a word into a statute where the Legislature has not done so, it is incumbent upon this Court to reverse the courts below and allow Appellants to prosecute their claim.

7. In *Lamp v. Heyman,* this Court prospectively required a Plaintiff to promptly deliver a filed Writ of Summons to the sheriff for service of process. However, the Appellants in *Lamp,* and all similarly situated Plaintiffs, were given a ninety day grace period in which to comply with the new rule. The grace period provided in *Lamp* was consistent with that line of Pennsylvania cases which hold it violative of due process to not provide a grace period where a shortened statute of limitations is applied retroactively. The failure of the Superior Court to provide Appellants with a grace period to comply with the new promptness requirement was violative of due process and, thus, is reversible error.

8. The case at bar cannot be reasonably compared to *Lamp v. Heyman,* which the Superior Court relied on for affirming dismissal of Appellants' claim. Unlike *Lamp,* Appellees herein were at all times aware that they had been sued pursuant to rights protected by the Commonwealth.

9. To the extent that an analogy exists between *Lamp* and the case at bar it supports reversal of the court below. Just as Pa.R.C.P. 1007 was found in *Lamp* to be an unconditional right for

commencing an action, so to is 42 Pa.C.S.A. § 5503, which provides the same unconditional protection for state claims filed in federal court. Moreover, just as the court in *Lamp* found non-pros to be the sole means of attacking delay in the absence of a rule to the contrary, so too is non-pros the proper means of attacking any delay in the case at bar.

10. It is elementary that this Supreme Court has *exclusive* supervisory powers over the Courts of the Commonwealth and the procedures therein. Moreover, any act of a court which exceeds its jurisdiction or power is a nullity. Clearly, the Court of Common Pleas and the Superior Court acted outside of the parameters of their jurisdiction when they improperly exercised supervisory power by adding a promptness requirement to a § 5103 transfer. Thus, the promptness amendment imposed on the Appellants by the courts below is a nullity, requiring reversal of their dismissal of Appellants claims.

* * *

A. Under *Lamp v. Heyman*, it was error for the Superior Court not to provide a grace period for Appellants.

Even if it is assumed arguendo that the Superior Court did have the jurisdiction or power to require promptness in a § 5103 transfer, which Appellant vociferously denies, it was simply unfair and, thus, a violation of both federal and state due process to retroactively apply promptness without providing a grace period for then existing claims dismissed from federal court for lack of subject matter jurisdiction. *Lamp, supra, Byers, supra.*

Surely Appellee will, without merit, argue that below, the Superior Court relied on *Williams, supra,* wherein the Superior

Court in dictum first referred to "promptly effecting a § 5103 transfer". (*infra* at 30). Appellees' rationale is that because *Williams* was decided more than 90 days before Appellants were dismissed from federal court for lack of subject matter jurisdiction, the application of the "controlling dictum" in *Williams* to the case at bar was prospective and thus not violative of *Lamp*.

Appellants submit that dicta uttered by any court is not controlling:

> "... language in a judicial opinion going beyond the issues raised and not applicable to the particular facts of the case is obiter dictum. Such statements, being unnecessary for the decision, cannot be controlling in a subsequent action, for nothing can be stare decisis which was not actually considered and determined ...
>
> Nevertheless, principles announced by the ...

* * *

(3)

Supreme Court, U.S.
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No. 94 - 255

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

JEAN COLLINS, an individual and
TERRY COLLINS, her husband,

Petitioners,

vs.

GREENE COUNTY MEMORIAL HOSPITAL, a corporation; and ARUNAVA DAS, M.D., an individual,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONERS' REPLY BRIEF TO RESPONDENT, GREENE COUNTY MEMORIAL HOSPITAL'S BRIEF IN OPPOSITION

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19 pp

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QUESTION PRESENTED

Together with the questions already presented to the Court the following question is added which is presented in response to Respondent's Brief in opposition;

> Whether this Honorable Court has jurisdiction to review this action and whether a federal question was presented and/or passed upon in the Courts of Pennsylvania?

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APPENDIX

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No. 94 - 255

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JEAN COLLINS, an individual and
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On Petition for a Writ of Certiorari to the Supreme Court of Pennsylvania

PETITIONERS' REPLY BRIEF TO RESPONDENT, GREENE COUNTY MEMORIAL HOSPITAL'S BRIEF IN OPPOSITION

OPINIONS BELOW

The Pennsylvania Supreme, Per Curium Order and dissenting Opinion, is reported at 640 A.2d 379, ___ Pa. ___ (1994). The Pennsylvania Superior Court Opinion, is reported at 419 Pa.Super. 519, 615 A.2d 760 (1992). The written opinion of the Court of Common Pleas of Greene County, Pennsylvania is unreported, (all opinions below can be found in the appendix to the Petition for Writ of Certiorari at A-2 through A-26).

STATEMENT OF JURISDICTION

This court has jurisdiction pursuant to 28 U.S.C. § 1257. Federal questions were presented and passed upon in the courts of Pennsylvania including Pennsylvania's highest court. The federal questions are as follows; whether a state

court can ignore a state statute; whether a court can change a state statute by adding a word; whether the word "prompt" is vague for statutory construction; and whether a court can retroactively apply an undefined court changed statute, (see, the contents of this Reply Brief's arguments below for the argument that the federal questions have been presented and/or passed upon).

The Pennsylvania Supreme Court denied Rehearing on May 11,1994, (Appendix to Petition for Writ of Certiorari at A- 1). The Petition for Writ of Certiorari was filed within ninety days of that date, on Aug[illegible] 8, 1994 which satisfies Supreme Court Rule 13.4.

U.S. CONSTITUTIONAL PROVISIONS INVOLVED

A. Due Process Rights

The Fifth and Fourteenth Amendments to the Constitution of the United States; (The pertinent parts of these amendments can be found on pages 3-4 of the Petition for Writ of Certiorari).

B. Right to Trial by Jury

The Seventh Amendment to the Constitution of the United States;(the provisions of this amendment can be found at page 4 of the Petition for Writ of Certiorari).

CONCISE STATEMENT OF THE CASE

Petitioners' original Statement of the Case can be found at pages four through six of the Petition for Writ of Certiorari. For the purposes of this Reply Brief the following is included. The Respondent, Greene County Memorial Hospital states three reasons in its Respondent's Brief in Opposition for Denying the Writ: 1) that this case presents no substantial Federal question; 2) that the Federal questions raised in the Writ of Certiorari were not "pressed or passed upon" by the Pennsylvania courts; and 3) that the decisions

by the Pennsylvania Superior and Supreme Courts were proper and do not justify review by this Court. All three of the Respondents' reasons are erroneous assertions. For the reasons stated below and in the Petition for Writ of Certiorari this Honorable Court should grant Writ of Certiorari in this case.

I.
THE CASE DOES PRESENT SUBSTANTIAL FEDERAL QUESTIONS

A. The Petitioners do have a Seventh Amendment Right to trial by jury.

In the Respondent's Brief in Opposition. The Respondent mistakenly asserts that the Petitioners do not have a Seventh Amendment Right to Trial by Jury. The Respondent bases this assertion on the Unites State Supreme Court ruling that the Seventh Amendment does not apply to a proceeding commenced in state court, Minneapolis and St. louis R.R. Co. v. Bombolis, 241 U.S. 211 (1916). What the Respondent fails to realize is that the Pennsylvania State Transfer Statute, 42 Pa.C.S.A. § 5103(b), provides that "[T]he pleadings [transferred from federal to state court] shall have the same effect as under the practice in the United States Court, . . . ", (the full text of 42 Pa.C.S.A. § 5103 is printed on pages seven through nine of the Writ of Certiorari). The Petitioners asserted their Seventh Amendment Right to Trial by Jury in federal court before the transfer by demanding a trial by jury, (see Appendix A-1, of this Reply Brief). Therefore, the Petitioners' right to trial by jury has been preserved and the Legislature of Pennsylvania has maintained that right by way of the Pennsylvania Transfer Statute. Furthermore, although there is a dearth of case law on the matter. The Supremacy clause of the United States Constitution should require that all cases correctly commenced in a court of the United States and then, through judicial discretion, transferred to a state court, be controlled by the rights preserved by the United States Constitution because at least one of the parties invoked their right to trial

by jury in federal court. It should be remembered that the U.S. District Court for the Western District of Pennsylvania still has jurisdiction over this case regarding the Title VII claim. The District Court ordered the Respondent Hospital to implement programs to eliminate sexual harassment in the work place. If Respondent, Greene County Memorial Hospital, fails to adhere to that order. The District court can hold the Respondent Hospital in contempt.

Clearly when a state legislature provides that "[T]he pleadings [transferred from federal to state court] shall have the same effect as under the practice in the United States Court, . . . ", (see, 42 Pa.C.S.A. § 5103(b)), and those federal pleadings include a timely demand for trial by jury, the Seventh Amendment applies to the state proceeding which originated in federal court.

B. The Petitioners have not imprudently turned a state law into a constitutional issue

The actions by the Courts of Pennsylvania have violated the United States Constitution of the United States as stated in the Writ of Certiorari. The Petitioners have not turned a state issue into a federal issue as claimed by the Respondent, Greene County Memorial Hospital. It is the state courts of Pennsylvania that have made a constitutional issue out of this case by ignoring one Pennsylvania statute and changing another and in doing so depriving the Petitioners of their day in court. The beneficiaries of the constitutional deprivations have been the Respondents. That is why the Respondent, Green County Memorial Hospital is so vehemently contesting the Writ of Certiorari.

The issue of this case is not whether the courts of Pennsylvania have properly interpreted a Pennsylvania Statute as claimed by the Respondent, Hospital. The issues are; 1) whether a court can change a statue promulgated by a state legislature; 2) whether a court can ignore a statute promulgated by a state legislature; 3) whether the word "promptly" is vague for statutory construction; and 4) whether a court can rule that just under seven months is not "prompt" when there was no previous definition of "prompt"

in regards to a transfer. As stated in the Petition for Writ of Certiorari the courts of Pennsylvania have violated the Petitioners' constitutional rights.

In this case, Supreme Court of Pennsylvania Justice Papadakos, in a dissenting opinion, brought to the forefront the issue as to whether the term "prompt" is constitutionally vague, see, Collins v. Greene County Memorial Hospital, ___ Pa. ___ 640 A.2d 379, 379-380 (1994),(A-4, to the Appendix for the Petition for Writ of Certiorari):

> "Unfortunately, neither the Superior Court's opinion nor this Court's per curiam order offer any definitive guidance on the question of what constitutes a "prompt" transfer of an action pursuant to 42 Pa.C.S.A. § 5103 from a federal forum to a state on other than the Superior Court's analogy to the rules developed regarding a writ of summons or complaint which is not served within thirty days.
>
> . . .
>
> However, I do not read the Superior Court's opinion to be imposing a presumption that the transferred action is "dead" on the thirty-first day, as we have concluded with unserved writs of summon or complaints."

Clearly the actions by the Courts of Pennsylvania as stated in the Writ for Certiorari are repugnant to the United States Constitution.

II.
FEDERAL QUESTIONS WERE PRESENTED AND CONSIDERED BY THE HIGHEST COURT OF PENNSYLVANIA IN THIS CASE

As stated in People of the State of New York v. Zimmerman, 49 S.Ct. 61, 63 278 U.S. 63:

> "There are various ways in which the validity of a state statute may be drawn in question on the ground

> that it is repugnant to the Constitution of the United States. No particular form of words or phrases is essential,but only that the claim of invalidity and the ground therefor be brought to the attention of the state court with fair precision and in due time. And if the record as a whole shows either expressly or by clear intendment that this was done, the claim is to be regarded as adequately presented."

The Petitioner raised the questions of the constitutionality of 42 Pa.C.S.A. §5103 as changed by the courts of Pennsylvania and the courts' failure adhere to a statutes promulgated by the legislature of Pennsylvania, 42 Pa.C.S.A. § 5535 read in conjunction with 42 Pa.C.S.A. §5103:

1) Argument II of the Petitioners' Superior Court of Pennsylvania Brief, (see, page 2 of the Appendix to his Reply Brief);

"BECAUSE A COURT HAS NO POWER TO INSERT A WORD INTO A STATUTORY PROVISION WHERE THE LEGISLATURE HAS FAILED TO SUPPLY IT, IT WAS ERROR FOR THE TRIAL COURT TO READ THE WORD "PROMPT" INTO 42 PA. C.S.A. §5103(b)"

2) Argument II of the Petitioners' Supreme Court of Pennsylvania Brief, (see, page 2 of the Appendix to his Reply Brief);

"BECAUSE A COURT HAS NO POWER TO INSERT A WORD INTO A STATUTORY PROVISION WHERE THE LEGISLATURE HAS FAILED TO SUPPLY IT, IT WAS ERROR FOR THE TRIAL COURT TO READ THE WORD "PROMPT" INTO 42 PA. C.S.A. §5103(b) AND FOR THE SUPERIOR COURT TO AFFIRM THE TRIAL COURT DISMISSAL OF THE APPELLANTS CLAIM"

3) Summary of the Argument, Petitioners' Pennsylvania Superior Court Brief, (quoted at page 8a,

Appendix A, Respondent's Brief in Opposition); and Summary of the Argument, Petitioners' Pennsylvania Supreme Petition for Allowance of Appeal (quoted at page 19a, Appendix B, Respondent's Brief in Opposition);

> "It is a fundamental precept of statutory construction that a court cannot insert a word into a statute where the legislature has failed to supply it."

4) Summary of the Argument, Petitioners' Pennsylvania Supreme Court Brief, (quoted at page 26a, Appendix C, Respondent's Brief in Opposition);

> "6. The word "prompt" appears nowhere in §5103 nor can it be reasonably implied. Thus, because it is reversible error for a court to insert a word into a statute where the Legislature has not done so, it is incumbent upon the Court to reverse the courts below and allow Appellants to prosecute their claim."
>
> "7. . . . The failure of the Superior Court to provide a grace period to comply with the new promptness requirement was violate of due process and, thus, is reversible error.";

5) Argument II, Petitioners' Reply Brief in the Pennsylvania Supreme Court, (see, Appendix C, page 3, of this Reply Brief);

> " . . . Appellants had one year within which to affect a transfer pursuant to the terms of 42 Pa.C.S.A. §5103(b)(2) and §5535(a).";

6) Petitioners' Application for Reargument in the Pennsylvania Supreme Court, (see, Appendix C, page 3, of this Reply Brief);

> "2. The Court's opinion refers to the word "prompt" and affirms the lower Court's opinion

setting forth this word as part of the statutes involved in this case. The word does not appear in any of the statutes."

"3. The Court, due to press of business, apparently did not have the opportunity to read the statutes involved. These statutes clearly sustain the Petitioners' position, that they had one year to file their action following dismissal from Federal Court.;

7) The dissenting opinion of Pennsylvania Supreme Court Justice Papadakos, clearly addresses the fact the word "prompt" is vague and that the issue was before the highest court of Pennsylvania as evidenced by the following passage of his opinion, Collins, Supra at 379-380, (see, A-4, to the Appendix to the Petitioners' Writ for Certiorari);

"Unfortunately, neither the Superior Court's opinion nor this Court's per curiam order offer any definitive guidance on the question of what constitutes a "prompt" transfer of an action pursuant to 42 Pa.C.S.A. § 5103 from a federal forum to a state on other than the Superior Court's analogy to the rules developed regarding a writ of summons or complaint which is not served within thirty days.

. . .

However, I do not read the Superior Court's opinion to be imposing a presumption that the transferred action is "dead" on the thirty-first day, as we have concluded with unserved writs of summon or complaints."

Clearly the arguments by the Petitioners to the Courts of Pennsylvania raised the issue that a court's inclusion of the word "prompt" in a statue in repugnant to the United States Constitution. **In fact, the Supreme Court of Pennsylvania, the highest court of Pennsylvania, in a dissenting opinion, by Justice Papadakos, brought out the fact that the word "prompt" has not been defined, thereby bringing to the**

forefront the constitutional issue of vagueness. Clearly Pennsylvania Supreme Court Justice Papadakos understood that a constitutional argument was being raised by the Petitioners and in fact agreed with the Petitioners, that the term "prompt", without a defined length of time, ". . . does a disservice to the bar and these litigants", Collins, Supra. at 380, (i.e., is repugnant to the United States Constitution) and therefore dissented.

There can be no question as to the proper presentation of a federal claim when the highest state court passes on the issue, see, Raley v. Ohio, 360 U.S. 423, 3 L. Ed. 2d 1344, 79 S.Ct. 1257 (1959). Furthermore, where a state supreme court reaches and decides a constitutional issue, the issue can be considered by the United States Supreme Court whether or not the issue was raised by the Petitioner during the state appeal, see, Jennings v. Georgia, 418 US 153, 41 L. Ed. 2d 642, 94 S.Ct. 2750 (1974). As noted above, the dissenting opinion of Pennsylvania Supreme Court Justice Papadakos is clear evidence that the Pennsylvania Supreme court did pass on the issue as to whether the word "prompt" gave sufficient notice, i.e. whether the word "prompt" is vague. This Honorable Court should take the opportunity at this time to instruct the Courts and Legislatures of the States and Territories of the United States that a statute must give a definite length of time to assert a right and that the word "prompt", without definition will not satisfy due process.

III.
THE DECISIONS BY THE COURTS OF PENNSYLVANIA WERE NOT PROPER

As set out in Petitioners' Writ for Certiorari, the actions by the courts of Pennsylvania were not proper and did not comport with the United States Constitution. Supreme Court of Pennsylvania Supreme Court Justice Papadakos pointed out in his dissenting opinion that the word "prompt" was not defined. This is a prime example of a vague on it face statute as defined in Connally v. General Construction Co., 269 U.S. 385, 391, 46 S.Ct. 126, 127, 70 L.Ed 322 (1926).

Is "prompt" ten days? twenty days? thirty day? one-hundred days? Who knows? The word "prompt" has not been defined by either the Courts or Legislature of Pennsylvania. Obviously the Petitioners' due process rights have been violated and this Honorable Court should correct the blatant mistakes of the Courts of Pennsylvania.

Furthermore, 42. Pa. C.S.A. §5103(b), the Pennsylvania Transfer Statue, would never make reference to the 42 Pa. C.S.A. §5535(a)(2)(i), unless the legislature of Pennsylvania intended for a party to have one year to transfer an action from federal court to state court. The Respondent, Hospital's position that the two statutes are independent of each other is not practical. Why else would 42 Pa. C.S.A. §5103(b), specifically mention 42 Pa.C.S.A. § 5535, unless the one year time limit was to apply? For this reason the Respondent's position is completely without merit.

CONCLUSION

For the reasons stated in this Reply brief and the Petition for Writ of Certiorari this Honorable Court should grant the Petition so that the States and Territories of this Unites States will be on notice that it is improper for a court to change a statute and then to give no guidance as to what their change means when such change creates an unconstitutionally vague statute. This court should reinstate the Petitioners' cause of action.

Respectfully submitted,

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APPENDIX

APPENDIX - A

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

CIVIL DOCKET SHEET CASE NO. 88-967

PLAINTIFF DEFENDANT

COLLINS GREENE COUNTY MEMORIAL HOSPITAL

DATE	NR	PROCEEDINGS
1988		
Apr. 29	1	COMPLAINT / w Jury demand and summons issued

* * *

APPENDIX - B

TITLE OF ARGUMENT II OF PETITIONERS' PENNSYLVANIA SUPERIOR COURT BRIEF

BECAUSE A COURT HAS NO POWER TO INSERT A WORD INTO A STATUTORY PROVISION WHERE THE LEGISLATURE HAS FAILED TO SUPPLY IT, IT WAS ERROR FOR THE TRIAL COURT TO READ THE WORD "PROMPT" INTO 42 PA. C.S.A. §5103(b)"

TITLE OF ARGUMENT II OF PETITIONERS' PENNSYLVANIA SUPREME COURT BRIEF

"BECAUSE A COURT HAS NO POWER TO INSERT A WORD INTO A STATUTORY PROVISION WHERE THE LEGISLATURE HAS FAILED TO SUPPLY IT, IT WAS ERROR FOR THE TRIAL COURT TO READ THE WORD "PROMPT" INTO 42 PA. C.S.A. §5103(b) AND FOR THE SUPERIOR COURT TO AFFIRM THE TRIAL COURT DISMISSAL OF THE APPELLANTS CLAIM"

APPENDIX C

TITLE OF ARGUMENT II, PETITIONERS' REPLY BRIEF IN THE SUPREME COURT OF PENNSYLVANIA

Even if this Court finds that Appellants claim was terminated when dismissed from Federal Court, Appellants had one year within which to affect a transfer pursuant to the terms of 42 Pa.C.S.A. §5103(b)(2) and §5535(a).

PARAGRAPHS TWO AND THREE OF PETITIONERS' APPLICATIONS FOR REARGUMENT IN THE SUPREME COURT OF PENNSYLVANIA

2. The Court's opinion refers to the word "prompt" and affirms the lower Court's opinion setting forth this word as part of the statutes involved in this case. The word does not appear in any of the statutes.

3. The Court, due to press of business, apparently did not have the opportunity to read the statutes involved. These statutes clearly sustain the Petitioners' position, that they had one year to file their action following dismissal from Federal Court.